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THE INDIAN EVIDENCE ACT.

THE

INDIAN EVIDENCE ACT,

No. I OF 1872.

As amended by Acts XVIII of 1872 & XVII of 1886.

TOGETHER WITH

AN INTRODUCTION, EXPLANATORY NOTES AND AN APPENDIX.

Price—Rs. 2-8-0

MADRAS

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PREFACE.



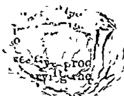
As there are already a large number [illegible] works on the subject, the bringing out of this little volume may require a few words of apology. The text-books in use are from their cost beyond the reach of many candidates for the Special and Pleader Tests. Their size also precludes the possibility of their being thoroughly studied by such candidates, who have very often little time to spare for law-studies. It has therefore been thought desirable to publish this book whose cost, size and matter will, it is hoped, be found suitable to the means, opportunities and requirements of those for whom it is intended.

The author has consulted in the preparation of this work the leading text-books on the subject, specially the works of TAYLOR, STEPHEN, FIELD and CUNNINGHAM.

THE AUTHOR.

MADRAS,
1st November, 1887.

CONTENTS.



INTRODUCTION ... ...

PREAMBLE .. ..

PART I.

EVIDENCE OF FACTS.

CHAPTER I.—Preliminary.

Sections.		
1.	Short title	1
	Extent	1
	Commencement of Act	1
2	Repeal of enactments	2
3.	Interpretation-clause	2
4	"May presume"	5
	"Shall presume"	5
	"Conclusive proof"	5

CHAPTER II.—Of the Relevancy of Facts.

5	Evidence may be given of facts in issue and relevant facts	5
6	Relevancy of facts forming part of same transaction.	6
7.	Facts which are occasion, cause, or effect of facts in issue	7
8	Motive, preparation and previous or subsequent conduct	7
9	Facts necessary to explain or introduce relevant facts.	10
10.	Things said or done by conspirator in reference to common design	11
11.	When facts not otherwise relevant become relevant	11
12.	In suits for damages, facts tending to enable Court to determine amount, are relevant	12
13.	Facts relevant when right or custom is in question.	12
14.	Facts showing existence of state of mind, or of body, or bodily feeling	14

Sections		Page.
15.	Facts bearing on question whether act was accidental or intentional	16
16.	Existence of course of business when relevant ...	17
	Admissions.	
	sions defined	18
	pon—	
	rty to proceeding or his agent	18
	uitor in representative character	18
	by party interested in subject-matter	18
	by person from whom interest derived	18
19.	Admissions by persons whose position must be proved as against party to suit	19
20.	Admissions by persons expressly referred to by party to suit	20
21.	Relevancy of admissions against or in behalf of persons concerned	20
22.	When oral admissions as to contents of documents are relevant	21
23.	Admissions in Civil cases when relevant	22
24.	Confession caused by inducement, threat, or promise irrelevant	22
25.	Confession made to a Police officer not to be used as evidence	23
26.	Confession made by accused while in custody of Police, not to be used as evidence	24
27.	So much of statement or confession made by accused as relates to fact thereby discovered, may be proved	24
28.	Confession made after removal of impression caused by inducement, threat, or promise, relevant ..	24
29.	Admission otherwise relevant not to become irrelevant because of promise of secrecy, &c	24
30.	Consideration of proved admission affecting person making it and others jointly under trial for same offence	25
31.	Admissions not conclusive proof, but may estop ...	26
	Statements by Persons who cannot be called as Witnesses	
32.	Cases in which statement of relevant fact by person who is dead or cannot be found, &c, is relevant.	26

Sections. *Page.*

When it relates to cause of death 26
or is made in course of business 27
or against interest of maker 27
or gives opinion as to public right or custom or matters of general interest 27
or relates to existence of relationship ... [illegible]
or is made in will or deed of deceased person [illegible]
or relates to transaction mentioned in section clause (a) ... ... [illegible]
or is made by several persons and expresses feelings relevant to matter in question 28

33. Evidence in a former judicial proceeding when relevant. 32

Statements made under special circumstances.

34 Entries in books of account when relevant 34
35. Entry in public record, made in performance of duty enjoined by law, when relevant 35
36. Maps and plans when relevant 35
37. Statements as to fact of public nature contained in any Act or Notification of Government, when relevant. 36
38. Statements in law-books 36

How much of a Statement is to be proved.

39 What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers 36

Judgments of Courts of Justice when relevant.

40. Previous judgments relevant to bar a second suit or trial 37
41. Judgments in probate, &c, jurisdiction 40
42. Judgment, order, or decree between third parties when irrelevant and when not 41
43. What judgments, &c., not relevant 42
44. Fraud, collusion, and incompetency of Court may be proved 43

Opinions of third persons when relevant.

45. Opinions of experts 44
46. Facts bearing upon opinions of experts 45

Sections		Page.
47.	Opinions as to hand-writing	46
48.	Opinion as to existence of right or custom when relevant	46
49	Opinions as to usages, tenets, &c , when relevant	47
	[illegible]mion on relationship, when relevant	47
	[illegible]ds of opinion, when relevant	48

Character when relevant.

	[illegible]ivil cases, character to prove conduct imputed, irrelevant	48
53.	In criminal cases, previous good character relevant.	48
54	Previous conviction in criminal trials relevant, but not previous bad character, except in reply ...	49
55.	Character as affecting damages	49

PART II.
ON PROOF.

CHAPTER III.—Facts which need not be proved.

56.	No evidence required of fact judicially noticed ...	50
57.	Facts of which Court must take judicial notice ...	50
58.	Facts admitted	52

CHAPTER IV.—Of Oral Evidence.

59.	Proof of facts by oral evidence	53
60.	Oral evidence must be direct	53

CHAPTER V.—Of Documentary Evidence.

61.	Proof of contents of documents	53
62.	Primary evidence	54
63.	Secondary evidence	54
64.	Proof of documents by primary evidence	55
65.	Cases in which secondary evidence relating to documents may be given	55
66.	Rules as to notice to produce	57
67	Proof of signature and hand-writing of person alleged to have signed or written document produced.	58
68.	Proof of execution of document required by law to be attested	59
69.	Proof where no attesting witness found	59
70	Admission of execution by party to attested document	59

Sections.		*Page.*
71.	Proof when attesting witness denies the execution.	60
72.	Proof of document not required by law to be attested.	60
73.	Comparison of hand-writings	60

Public Documents.

74.	Public documents	[illegible]
75	Private documents	[illegible]
76.	Certified copies of public documents ...	[illegible]
77	Production of such copies	[illegible]
78.	Proof of other official documents	62

Presumptions as to Documents.

79.	Presumption as to genuineness of certified copies ...	63
80.	Presumption on production of record of evidence ...	63
81.	Presumption as to Gazettes	64
82.	Presumption as to document admissible in England without proof of seal or signature	64
83.	Proof of maps made for purposes of any cause ...	64
84.	Presumption as to collections of laws and reports of decisions	65
85.	Presumption as to powers of attorney	65
86	Presumption as to certified copies of foreign judicial records	65
87.	Presumption as to books and maps	65
88.	Presumption as to photographs, machine copies, and telegraphic messages	65
89.	Presumption as to due execution, &c., of documents not produced	66
90.	Documents thirty years old	66

CHAPTER VI.—Of the Exclusion of Oral by Documentary Evidence.

91.	Evidence of terms of written contract	67
92.	Exclusion of evidence of oral agreement	69
93.	Exclusion of evidence to explain or amend ambiguous document	73
94.	Exclusion of evidence against application of document to existing facts	73
95	Evidence as to document unmeaning in reference to existing facts	74

Sections		*Page.*
96.	Evidence as to application of language which can apply to one only of several persons	74
97.	Evidence as to application of language to one of two sets of facts to neither of which the whole cor-rectly applies	74
	nce as to meaning of illegible characters, &c	74
	nay give evidence of agreement varying terms document	76
	aving of provisions of Indian Succession Act relating to wills	76

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.—Of the Burden of Proof.

1	Burden of proof	77
2.	On whom burden of proof lies	77
3	Burden of proof as to particular fact	79
4.	Burden of proving fact to be proved to make evi-dence admissible	79
105.	Burden of proving that case of accused comes with-in exceptions	79
106.	Burden of proving fact especially within knowledge.	80
107.	Burden of proving death of person known to have been alive within thirty years	81
108.	Burden of proving that person is alive who has not been heard of for seven years	81
109.	Burden of proof as to partnership, tenancy, and agency	81
110.	Burden of proof as to ownership	82
111.	Proof of good faith in transactions where one party is in relation of active confidence	82
112.	Birth during marriage, conclusive proof of legiti-macy	83
113	Proof of cession of territory	83
114.	Court may persume existence of certain facts ...	83

CHAPTER VIII.—Estoppel.

115.	Estoppel	88
116	Estoppel of tenant	91

Sections		Page.
117	Estoppel of acceptor of bill of exchange, bailee, or licensee	92

CHAPTER IX.—Of Witnesses.

118.	Who may testify	92
119.	Dumb witnesses	93
120.	Married persons in Civil and Criminal proceedi[illegible]	[illegible]
121.	Judges and Magistrates	[illegible]
122.	Communications during marriage	[illegible]
123.	Evidence as to affairs of State	[illegible]
124.	Official communications	95
125.	Information as to commission of offences	96
126.	Professional communications	96
127.	Section 126 to apply to interpreters, &c.	98
128.	Privilege not waived by volunteering evidence ...	98
129.	Confidential communication with legal advisers ...	99
130.	Production of witness' title-deeds	100
131.	Production of documents which another person, having possession, would be entitled to refuse to produce	100
132.	Witness not excused from answering on ground that answer will criminate	100
	Proviso	100
133.	Accomplice	101
134.	Number of witnesses	102

CHAPTER X.—Of the Examination of Witnesses.

135.	Order of production and examination of witnesses.	103
136.	Judge to decide as to admissibility of evidence ...	103
137.	Examination-in-chief	104
	Cross-examination	104
	Re-examination	104
138.	Order of examination. Direction of re-examination.	104
139.	Cross-examination of person called to produce a document	105
140.	Witnesses to character	106
141.	Leading question	106
142.	When they must not be asked	106
143.	When they may be asked	106
144.	Evidence as to matters in writing	106
145.	Cross-examination as to previous statements in writing	107

Sections.		Page.
146.	Questions lawful in cross-examination	107
147.	When witness to be compelled to answer ...	108
148	Court to decide when question shall be asked and when witness compelled to answer	108
149.	Question not to be asked without reasonable grounds	109
	:edure of Court in case of question being asked thout reasonable grounds	109
	ent and scandalous questions	110
	stions intended to insult or annoy	110
	lusion of evidence to contradict answers to questions testing veracity	110
154.	Questions by party to his own witness	111
155.	Impeaching credit of witness	111
156.	Questions tending to corroborate evidence of relevant fact admissible	112
157.	Former statements of witness may be proved to corroborate latter testimony as to same fact ...	113
158.	What matters may be proved in connection with proved statement relevant under sections 32 or 33.	113
159.	Refreshing memory	113
	When witness may use copy of document to refresh memory	114
160.	Testimony to facts stated in document mentioned in section 158	114
161.	Right of adverse party as to writing used to refresh memory	115
162.	Production of documents	115
	Translation of documents	115
163.	Giving, as evidence, of document called for and produced on notice	115
164.	Giving, as evidence, of document, production of which was refused on notice	116
165.	Judge's power to put questions or order production.	116
166.	Power of jury or assessors to put questions ...	117

CHAPTER XI.—Of improper Admission and Rejection of Evidence.

167.	No new trial for rejection or improper reception of evidence	118
	SCHEDULE	120

APPENDIX.

	Page.
Mr. Stephen's Speech	[illegible]
Act XIX of 1853, Sec 26	[illegible]
19 and 20, Vic , ch. 113	[illegible]
22, Vic., ch. 20	xiv
48 and 49, Vic., ch. 74	xv
22 and 23, Vic., ch. 63	xvi
24, Vic., ch. 11	xviii
31 and 32, Vic., ch. 37	xix
Act XVIII of 1872	xxi
Act X of 1873	xxii

INTRODUCTION.

1 *The position of the Law of evidence.*—The object of all laws is to create rights and duties and to enforce their observance. Th[illegible] that create rights and duties only are called *substantive laws*, are [illegible] provide measures against the violation of such rights an[illegible] pro[illegible] called *adjective* or *procedure laws*. When a right has been in[illegible] a duty has been violated, or sometimes even when there is fear of such infringement or violation, the individual aggrieved or the State puts the adjective or procedure law in force.

The adjective law may be roughly divided as follows* :—

(a) Rules as to preliminary proceedings such as the presenting of the plaint, the summoning of the opposite party, the stating of the case by the parties, the ascertaining of the points in dispute, the summoning of witnesses and the requiring of the production of documents.

(b) Rules as to the proof of the points in dispute by the statements of witnesses and the production of documents.

(c) Rules as to the modes of expressing the decision which the Judge arrives at by the application of the rules of *substantive law* to the facts which he considers as proved

(d) Rules as to the modes of carrying out the decision.

Headings (a), (c) and (d) have been put together in the Indian Law and have been technically called *procedure*; while heading (b), although none the less part of *procedure law*, has been made distinct under the name of *evidence*

2 *What should not be expected from a treati[illegible] [illegible]e Law of Evidence*—We should not expect it to teach u[illegible] whether the statement of a witness is true or untrue, an[illegible] to draw the proper inference from a number of facts suppo[illegible] have been proved to be true These questions, as to the [illegible] of evidence and inferences to be drawn therefrom, can be so[illegible] only by the Judge's own knowledge of the world †

* This division, without being exact and exhaustive, aims at only pointing out the province of the *law of evidence*.

† There are however exceptions, see sections 41, 79—90 and 112—114.

3 *What a treatise on the Law of Evidence aims at.—*

Firstly—It lays down the proper limits of a judicial enquiry As the time of the Court should not be unnecessarily taken up with enquiries having no bearing upon the case, it becomes necessary to determine what the legitimate limits of an enquiry should be Every judicial enquiry aims at determining the right or liability of a person The right [redacted] in question is a necessary inference from the truth or untruth [redacted]incipal facts in dispute between the parties; and these [redacted]cts in dispute from the truth or untruth of which the right [redacted]lity of a person directly arises are called *facts in issue*. The truth or untruth of the facts in issue may be established by direct evidence regarding them, or by evidence of other facts which by their intimate connection with the facts in issue render the facts in issue probable or improbable These other facts are called *relevant facts* Therefore the first enquiry in a treatise on evidence must be "What are those various connections or relations with *facts in issue* which make a fact *relevant?*" (For this see sections 5—55.) This sets the *limit to a judicial enquiry*, and it cannot therefore pass beyond *facts in issue* and *relevant facts* *

Secondly—Having determined the facts over which the enquiry should extend the next point is to determine which of these require proof and which not, for the latter see sections 56—58. Next as to the method of proving those facts which require proof, the cardinal principle is that the best possible proof that the nature of the fact admits of must be adduced, in order that the chances of error may be less. "When

* This does not however prevent the Judge from putting what questions he thinks proper whether relevant or irrelevant See section 165. The reason for this exception is thus given by Mr Stephen the framer of the Act —

"That part of the Law of Evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well educated Bar co-operating with the Judge and relieving him practic[illegible] of every other duty than that of deciding questions which may arise between them. I n[illegible] this state of things does not exist in India and that it would be a great mistake t[illegible]d. *In a great number of cases—probably the vast numerical majority—the Judge*[illegible] *whole trial himself.* In all cases he has to represent the inter-

the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself." Oral evidence or evidence by means of a copy may however be given under certain exceptional circumstances. When the matters above referred to have been proved as aforesaid, no [illegible] any oral agreement or statement shall be admitted, as betwe[illegible]ties or their representatives, for the purpose of in any way vary[illegible]g the effect of the document This rule also is subject to certain exceptions.

Of other matters oral evidence may be given provided it be *direct.* *

Thirdly —The next subject that should be taken up is *the production and effect of evidence.* Under this head rules regarding the burden of proof, the facts which a party may under certain circumstances be disqualified from proving (*estoppel,*) the competency of persons to give evidence, the facts of which certain witnesses cannot give or cannot be compelled to give evidence, the manner of examining witnesses, and the effect of the improper admission and rejection of evidence are laid down

4 *The difference between the English Law of Evidence and the Indian Law* —In England the Judge only expounds the law, while the jury decides upon questions of fact. As the jury consisted of persons who had no professional training it was considered that the evidence of interested parties, of persons of notorious bad characters and such like should not be placed before the jury owing to their general unreliability. Sometimes very important evidence was thus shut out. But thanks to the labours of Bentham the disability of such persons to bear evidence has

* The phrase *direct evidence* is used in two senses. As opposed to *circumstantial evidence* it means those statements and documents which prove the facts in issue themselves, *while circumstantial evidence* prove collateral facts relevant to *facts in issue* and thereby indirectly prove the facts in issue. As opposed to *hearsay evidence, direct evidence* means the evidence given by a person who has himself perceived by his senses the fact to which he testifies, *i. e.*, if it refers to a fact which can be seen it is the evidence of a person who says he has seen it, if it refers to a fact which can be heard it is the evidence of a person who says he has heard it; in short if it refers to a fact which can be perceived by any sense or in any other manner it is the evidence of a person who says he has perceived it by that sense or in that manner. *Hearsay evidence* is that of a person who has derived his information second hand. A says he saw B murder C. D who has heard this deposes that he heard A say that he saw B murder C. D's evidence is *hearsay* and should not be admitted, except under certain exceptional circumstances (see s. 32.) *Direct evidence* is used above in this latter sense.

3 For *affidavits*, see ss 191–197, Civ Pro Code of 1882; and for *proceedings before arbitrators*, see ss 506–526 of the same Code

Repeal of enactments.

2. On and from that day the following laws shall be repealed:—

(1) All rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India;

All such rules, laws and regulations as have acquired the w under the twenty-fifth section of 'The Indian Councils ,' in so far as they relate to any matter herein provided

The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

Note

The rules of the English common Law which were in use in this country previous to the passing of this Act are repealed by clause (1), inasmuch as they were only a set of unwritten laws brought into existence by the practice of the English Courts.

Interpretation-clause

3 In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"Court"

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.

"Fact"

"Fact" means and includes—

(1) any thing, state of things or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations

(*a*) That there are certain objects arranged in a certain order in a certain place, is a fact

(*b*) That a man heard or saw something is a fact.

(*c*) That a man said certain words is a fact

(*d*) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a parti-

cular sense, or is or was at a specified time conscious of a particular sensation, is a fact

(*e*) That a man has a certain reputation is a fact.

"Relevant."

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue"

The expression "facts in issue" me[illegible] includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations.

A is accused of the murder of B

At his trial the following facts may be in issue.—

That A caused B's death;

That A intended to cause B's death;

That A had received grave and sudden provocation from B,

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document"

"Document" means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document,

A caricature is a document

"Evidence" — "Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence:

(2) all documents produced for the inspection of the Court; such documents are called documentary evidence.

"Proved" — A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved" — A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist

"Not proved" — A fact is said not to be proved when it is neither proved nor disproved.

Note.

1. *Court.*—A Police-officer examining witnesses is not a Court A Sub-Registrar is a Court, *Petition of Sardari Lal*, 22 W. R. Cr. Rul., 10.

2. *Facts in issue and relevant facts*—The difference between them is pointed out in the introduction, para 3

3. *Documents.*—Compare the definition of the same in the I. P. C., s 29.

It has been said that a third sort of evidence called *material evidence* has been omitted. By material evidence is meant those things that are transmitted to the

Therefore the weapon cannot be called *evidence*

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"May presume"

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Shall presume."

When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

"Conclusive proof."

Note.

1. In English treatises presumptions are divided into *rebuttable presumptions* and *irrebuttable presumptions* *Rebuttable presumptions* correspond to the cases in which the Court *may* or *shall* presume a fact; while *irrebuttable presumptions* correspond to cases of *conclusive proof*.

2. For instances in which the Court *may* presume a fact see sections 86—88, 90, 114. For instances in which the Court *shall* presume a fact see sections 79—85, 89, 105 and for cases of conclusive proof see sections 41, 112, 113.

CHAPTER II.—Of the Relevancy of Facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Evidence may be given of facts in issue and relevant facts

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a*) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue—

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(*b*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its

contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

Note

2. ...reinafter.—The word *hereinafter* includes not only this chapter but also ss 145, 146, 148, 153, 155, 156, 157, 158.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Relevancy of facts forming part of same transaction.

Illustrations.

(*a*) A is accused of the murder of B by beating him Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c*) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d*) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Note

1. The facts alluded to in this section are generally known as part of the *res gestæ*

2 *Transaction.*—" A transaction is a group of facts so connected together as to be referred to by a single legal name as a crime, a contract, &c."

Facts which are occasion, cause, or effect of facts in issue

7. Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a*) The question is whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b*) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c*) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison and habits of B, known to A which afforded an opportunity for the administration of poison, are relevant facts.

Note

1 Of the illustrations, (*a*) is an instance of facts relevant as giving occasion or opportunity, (*b*) of facts constituting effect; (*c*) of facts constituting the state of things under which an alleged fact happened.

2. Illustration (*c*) seems to have been taken from the trial of Captain Donnellan for poisoning Sir Theodosius Boughton.

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements, accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations.

(*a*) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(*b*) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose is relevant.

(*c*) A is tried for the murder of B by poison

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant

(*d*) The question is, whether a certain document is the will of A. [illegible]

are relevant

(*e*) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f*) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the Police are coming to look for the man who robbed B,' and that immediately afterwards A ran away, are relevant.

(*g*) The question is, whether A owes B Rupees 10,000

The facts that, A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A, for he owes B 10,000 rupees,' and that A went away without making any answer, are relevant facts.

(*h*) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after a commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section 32, Clause (1), or

as corroborative evidence under section 157

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section 32, Clause (1), or

as corroborative evidence under section 157.

Note

[illegible]

W. R, 177.

2. *Statements* —Mere statements are not relevant under this section though they may be so under other sections, *e. g.*, sections 14, 17—38 To be relevant under this section they must either accompany and explain conduct which itself is rele-

[illegible]

impertinence, or if there was no opportunity to contradict it and especially when the statement was made in a letter, having failed to contradict the statement should not be taken as equivalent to consent

[illegible]

* The best interpretation is usc.

Facts necessary to explain or introduce relevant facts

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(*a*) The question is, whether a given document is, the will of A.
The state of A's property and of his family at the date of the alleged will may be relevant facts

(*b*) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B

(*c*) A is accused of a crime

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section 8, as conduct subsequent to and affected by facts in issue

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(*d*) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(*e*) A accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction

(*f*) A is tried for a riot, and is proved to have marched at the head of a mob The cries of the mob are relevant as explanatory of the nature of the transaction

Note

Illustration (*f*) is taken from Lord George Gordon's case

Thing said or done by conspirator in reference to common design

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, any thing said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the

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Note.

1 *Analysis*—(*a*) This section applies to the case either of an offence or an actionable wrong (*b*) There must be reasonable grounds for believing in the existence of the conspiracy. (*c*) The things said, done or written by one of the

2. The English Law requires that the thing said, *done or written must not* merely *refer* to the conspiracy but must also be *in furtherance* of it

3 *Proof of the conspiracy* may be allowed to be given after the proof of the statements See section 136

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a*) The question is, whether A committed a crime at Calcutta on a certain day

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant

(*b*) The question is, whether A committed a crime

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C or D, is relevant.

Note.

1. *Alibi* —This is the defence of having been so far away at the time of the commission of a crime from the scene of action that it makes it impossible that the prisoner could have committed it This sort of defence is relevant under this section

2. *Highly probable* —This phrase must be construed very strictly as meaning the highest degree of probability In *R* v *Purbhudas Ambaram*, 11 Bom H C R, 90, it was held that the existence of a number of inchoate forgeries in the house of the accused did not make the prisoner's commission of the particular forgery in question so probable that they could be tendered in evidence under this section

In suits for damages, facts tending to enable Court to determine amount are relevant

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

Note

1. *Torts* —In many actions for torts such as *defamation and seduction* the character of a person affects the amount of damages See note to section 55.

Other facts affecting damages in cases of *torts* are malice, insulting conduct and position in life of the defendant, the time and place of the injury, the provocation given by the plaintiff and the extent of injury suffered by the plaintiff

2 *Breach of Contract* —In a case of *breach of contract* the true measure of damages is the extent of the loss to the plaintiff and nothing else.

Facts relevant when right or custom is in question

13. Where the question is as to the existence of any right or custom, the following facts are relevant—

(*a*) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence:

(*b*) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortagage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Note.

1 *Right* —This has been interpreted by the Calcutta High Court in *Gujju Lal* v *Futteh Lal*, L R 6 Cal, 171, as meaning an *incorporeal right*, i e, not a right to the exclusive possession of any piece of land or other property, but a right to the mere use of it, while the right of possession remains with somebody else; *e g., an easement* See illustration

2. *Custom* —Custom is an unwritten law established by long usage. The cus-

[illegible]

A *particular* custom in order that it may be recognized as binding must satisfy the following requisites —

(1) *It must have been in use so long that the memory of man runneth not to the contrary*

(2) *It must have been uniform and continuous*

(3) *It must not be vague but definite.*

(4) *It must not be unreasonable, immoral or opposed to public policy.*

(5) *People must have acted under it with the conviction that it was legally binding upon them*

3 *Mercantile usage* —This is also a kind of custom prevailing among all

[illegible]

decisions, legal principles, analogies and the general opinion of merchants, while a *usage of trade* must be proved by evidence of instances and not by mere opinion

4 *Transaction* —The meaning of this word in clause (*a*) has been a subject of much discussion. It certainly includes such events as a sale, a lease, &c. As to whether it includes previous judicial decisions on the same subject between third parties there has been a difference of opinion It seems to be settled that previous judgments not *inter partes* are relevant to prove a right or custom only when it is of a *public nature*; the wording of s 42 seems to favour this view. *Gujju Lal* v. *Fatteh Lal*, L R. 6 Cal, 171.

5. *Provisions in this Act for the proof of custom* —Sections 13, 32 (clauses 4 and 7,) 42, 48, 49, 51. Compare these sections carefully.

6 *Common character of place* —When a custom or right has been proved with regard to one place it may be presumed to exist with regard to another place also, if there is a common character between the two. *Jones* v. *Williams*, 2 M & W, 326

Facts showing existence of state of mind, or of body or bodily feeling

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

Explanation.—A fact relevant as showing the existence of a relevant state of mind must show that it exists, not generally, but in reference to the particular matter in question.

Illustrations.

(*a*) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he is in possession of a particular stolen article.

\- . . . . "

(*b*) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

(*c*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(*d*) The question is, whether A, the acceptor of a Bill of Exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(*e*) *A is accused of defaming B by publishing* an imputation intended to harm the reputation of B

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(*f*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(*g*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(*h*) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i*) A is charged with shooting at B with intent to kill him In order to show A's intent, the fact of A's having previously shot at B may be proved.

(*j*) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(*k*) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts

(*l*) The question is, whether A's death was caused by poison

Statements made by A during his illness as to his symptoms are relevant facts.

(*m*) The question is, what was the state of A's health at the time when assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

Admissions.

Admission defined

17. An admission is a statement, oral or documentary, *which suggests any inference as to* any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, *hereinafter mentioned.*

Note

1. *Admissions* need not necessarily be against the interest of the person making them. They must only fulfil the requisites mentioned in the following sections.

2. *Admissions* may be *in court (judicial)* or *out of court (extra-judicial.) Admissions in court* cannot be contradicted during the progress of that suit by the party who made it. *Extra-judicial admissions* may be contradicted unless the party is estopped; see section 31. The admissions contemplated in the following sections are *extra-judicial admissions.*

Admission—by party to proceeding, or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under *the circumstances of the case,* as expressly or impliedly authorized by him to make them, are admissions.

by suitor in representative character;

Statements made by parties to suits, suing or sued in a *representative character,* are not admissions, unless they were made while the party making them held that character.

Statements made by—

by party interested in subject-matter;

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and *who make the statement in their character* of persons so interested, or

by person from whom interest derived.

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, *if they* are made during the continuance of the interest of the persons making the statements.

Note.

Admissions by agents, by persons holding a representative character, per- [illegible] and persons from whom interest is derived, and [illegible] excep- [illegible] es or

2. *Admissions* [illegible] *implied* authority to make them

* The acts of third parties do not bind,

(*f*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, was insolvent, suffered loss

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith

(*g*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(*h*) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i*) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(*j*) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(*k*) The question is, whether A has been guilty of cruelty towards B, his wife

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(*l*) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms are relevant facts.

(*m*) *The question is, what was the state of A's health at the time when assurance on his life was effected.*

Statements made by A as to the state of his health at the time in question, are relevant facts

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is relevant

(p) A is tried for a crime

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

Note

1 This section is a very important one in criminal cases. The state of mind of the prisoner at the time of the commission of the crime is very often an essential ingredient of the crime.

[illegible]

guilty knowledge See note to s 54.

3 *The explanation* to the section is very important.

15. When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Facts bearing on question whether act was accidental or intentional.

Illustrations

(a) A is accused of burning down his house in order to obtain money for which it is insured.

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(*b*) A is employed to receive money from the debtors of B It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive

The question is, whether this false entry was accidental or intentional

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(*c*) A is accused of fraudulently delivering to B a counterfeit rupee

The question is, whether the delivery of the rupee was accidental.

The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

Note.

explaining conduct which is itself relevant.

Existence of course of business when relevant

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations.

(*a*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(*b*) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant

Note.

The existence of an *invariable* course of business must be proved; otherwise evidence of the way in which some other transactions of the same kind were done will be irrelevant.

Admissions

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission defined.

Note.

1. Admissions need not necessarily be against the interest of the person making them They must only fulfil the requisites mentioned in the following sections.

2 Admissions may be *in court* (*judicial*) or *out of court* (*extra-judicial*) *Admissions in court* cannot be contradicted during the progress of that suit by the party who made it *Extra-judicial admissions* may be contradicted unless the party is estopped; see section 31 The admissions contemplated in the following sections are *extra-judicial admissions*

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

Admission—by party to proceeding, or his agent;

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

by suitor in representative character;

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by party interested in subject-matter;

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

by person from whom interest derived.

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Note.

* * * * * * *

2. *Admissions by agent.*—They will bind only if the agent had *express* or *implied* authority to make them

* The acts of third parties do not bind.

An agent who makes an admission during the continuance of the agency with respect to the matter of the agency and within the probable scope of his employment has *implied authority* to make them. So the servant of a livery stable-keeper while engaged in the sale of a horse belonging to his master has implied authority to give a warranty of soundness; but not so the servant of a private gentleman. *Brady v Tod*, L J. (N. S.) C. P., 223. A station-master in a railway has implied

admissions unless they band to the care of the her authority. *Mere-*

It has been decided that an infant cannot be bound by his own statement; *Kower Narain Rai v Srinath Mitter*, 9 W. R., 485. Much less can he be bound by an agent's admissions, for the infant cannot appoint an agent.

her by admissions; one of debts which would ers. See s 21, Indian

3. *Persons suing or sued in a representative character.*—Instances of such are *the assignee of a bankrupt, executor or administrator*, and *the manager of a minor's estate* holding a certificate under Act XL of 1858 Note that their statements must have been made while they held that representative character.

4. *Admissions of a party interested in subject-matter.*—For instance the admission of a beneficiary will bind the trustee. So also the admissions of one partner, even after the dissolution of the partnership, concerning the transactions of the firm will bind the others, if at the time of making such admissions he had a pecuniary interest in them It has been remarked by Mr. Taylor that the admission of a

5 *Admissions by persons from whom interest is derived* —The admission of an

derive his interest from the previous owner; but a purchaser at an *execution sale* does.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Admissions by persons whose position must be proved as against party to suit.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

Admissions by persons expressly referred to by party to suit

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is whether a horse sold by A to B is sound

A says to B—'Go and ask C, C knows all about it.' C's statement is an admission.

Note.

1. There must be an express reference The mere citing as a witness is not sufficient.

2 Mr. Taylor says on this point —"It matters not whether the question referred to be one of law or of fact, whether the persons to whom reference is made, have or have not any peculiar knowledge on the subject; or whether the statements of the referee be adduced in evidence in an action of tort or in an action of contract."

Relevancy of admissions against or in behalf of persons concerned

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases—

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations.

(*a*) The question between A and B is, whether a certain deed is or is not forged A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(*b*) A, the captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under Section 32, Clause (2).

(*c*) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under Section 32, Clause (2).

(*d*) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements though they are admissions, because they are explanatory of conduct influenced by facts in issue

(*e*) A is accused of fraudulently having in his possession counterfeit coin, which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

Note.

1. This section applies alike in criminal and civil cases.
2. Illustrations (*d*) and (*e*) are examples of clause (3).

When oral admissions as to contents of documents are relevant

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Note.

1. The *reason* for the rule in this section is that the best evidence that can be given must be adduced, or its absence must be sufficiently accounted for, before other evidence can be allowed.

2 *Secondary evidence*—See s 65.

3 *English Law.*—In *Slatterie v. Pooley*, 6 M & W, 664, Parke B. held that oral admission of the contents of a document was always admissible. The reason he

ruling in *Slatterie v Pooley* was severely criticised by Penefather C. B in *Lawless v. Queale*, 8 Ir. L Rep., 382, and again by the Privy Council in *Sheopershad v. Juggernath*, L. R., 10 I A, 79. The present section adopts the ruling in the two latter cases.

Admissions in civil cases, when relevant.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under Section 126.

Note.

The reason for the rule in this section is the well known maxim "*interest reipublicæ ut sit finis litium**" Therefore parties must be allowed to compromise a suit without fear of their statements being produced against themselves. It is therefore usual to add the phrase, "without prejudice," in all communications for compromise between the parties or their agents; and even when these words are not introduced the court will presume under the circumstances that these communications were 'without prejudice.' The admissions made before arbitrators are not however protected.

Confession caused by inducement, threat or promise is irrelevant.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any

* It is for the benefit of the State that there should be a limit to litigation.

advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Note

1. *Confession and Admission.*—In English law *confession* was the term used with reference to criminal cases, and *admission* with reference to civil cases. That distinction is not preserved in this Act. The only distinction in the Act appears to be that an *admission* may be favourable or unfavourable to the party making it, while a *confession* is always unfavourable to the party making it

2 *The analysis of the section.*—(1) This section applies to *criminal proceedings* (2) The confession must appear to the Court to have been *caused* by some *inducement, threat or promise.* (3) The inducement, threat or promise must have *reference* [illegible]

Then the confession cannot be proved.

3. *A person in authority*—Any person who is entitled to interfere in the matter is a person in authority. The prosecutor, the master or mistress of the accused (only when the offence concerns such master or mistress,) the constable or other officer in charge of the accused, and a Magistrate are persons in authority.

4 [illegible] exclusion [illegible] held out [illegible] authority [illegible] should be [illegible]

5 *Sufficient in the opinion of the Court to give the accused person grounds, &c*—It is not necessary that the inducement, threat or promise should be sufficient for [illegible] not the Jury.

6. The admissibility of a confession will not be affected by the fact of its having been retracted before the final trial.

7. One important exception to the inadmissibility of a confession made under inducement is that mentioned in Cr. Pr. C. of 1882, section 339; *viz*, the confession of an approver.

8. See Cr. Pr. Code of 1882, sections 163, 164, 364, 533.

9. *The burden of proof.*—The prosecution is not bound to prove absence of inducement, threat or promise for proving a confession, unless the circumstances of the case raise a presumption of inducement, threat or promise.

10 A confession may be worthless owing to its being meagre, misinterpreted or mendacious. To guard against these dangers the confession must be made as particular and minute as it can be made by questions.

Confession made to a Police officer not to be used as evidence.

25. No confession made to a Police officer, shall be proved as against a person accused of any offence.

Note.

1. Police officer must be held to include those officers who combine the offices of a Magistrate and a Police officer in the same person. *R. v. Harribole Chander Ghose*, I. L. R. 1 Cal, 207.

2. A prisoner may prove in his own favour admissions made by himself before a Police officer; they being not considered confessions *R. v. Macdonald,* 10 B. L. R., App 2.

3 A prisoner may also prove the confession of a co-accused to a Police officer which tends to exculpate the former; but owing to this section it cannot be used against the latter. *Empress v. Pitamber Jina,* I. L R 2 Bom, 61.

Confession made by accused while in custody of Police not to be used as evidence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

So much of Statement or confession made by accused as relates to fact thereby discovered may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Note.

1 *So much of the confession as relates distinctly to the fact thereby discovered.*—This must be construed very strictly and must be taken to mean only those words which immediately led to the discovery and not also other parts of the confession which tend to explain those words.

2. It has been a question whether the proviso in this section applies to section 25 also The wording *in the custody of a Police officer* contemplates only its applicability to section 26 But it has been decided that it does.

3 *Would the principle of this section apply to section 24?* The question has not been actually raised in any case. There is no authority in the Act to apply the principle of this section to section 24. But common sense requires that it should apply to section 24.

Confession made after removal of impression caused by inducement, threat or promise, relevant.

28. If such a confession as is referred to in Section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions,

or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him

Note

1 This section which provides for confessions in criminal cases is different in its tenor from section 23 which provides for admissions in civil cases; the reason being that extending the protection to criminal cases would prejudice the interests of the public

2 Not only are confessions made on inducement, threat or promise (section 24) and confessions made to a Police officer or while in the custody of a Police officer (sections 25 and 26) are protected, but also confessions made by a witness while in the witness box cannot be used against him in criminal proceedings except in a prosecution for giving false evidence (section 132) Therefore this section must be taken subject to section 132

3 When a confession is proved [illegible]

4 In arriving at a conclusion regarding the truth of the confession, the whole confession must be taken into consideration and not merely that part which is against the prisoner

5 A confession when proved may by itself be sufficient evidence for a conviction Corroboration is not absolutely necessary

Consideration of proved confession affecting person making it and others jointly under trial for same offence

30 When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Illustrations

(a) A and B are jointly tried for the murder of C It is proved that A said,—"B and I murdered C" The Court may consider the effect of this confession as against B

(b) A is on his trial for the murder of C There is evidence to show that C was murdered by A and B, and that B said,—"A and I murdered C"

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried

Note.

1 The general rule is that an accomplice's confession is unworthy of credit, for it is not given under oath, and there is a distinct motive to throw the blame on the co-accused This section introduces an exception to that rule, and must be very strictly construed

2. *The Court may take into consideration* —To mark the small degree of credit that should be attached to such confession, the words '*may take into consideration*' have been used.

The *Court* in this section includes the Jury as well as the Judge.

3. *May take into consideration such confession as against such other persons as well as against the person who makes such confession*.—These words have been taken to imply that the confession must implicate the person confessing as much as the person against whom it is sought to be used Else it is inadmissible, for in that case there is no guarantee to its truth. *R v Amrita Govinda*, 10 Bom H. R, 497, and *Queen v. Belat Ali and others*, 10 B L R, 458.

4 The two persons must be tried *jointly*. When one of several persons committed for the same offence pleads guilty and is convicted, he cannot be said to be tried jointly with others who plead not guilty. *R. v. Kalu Patil*, 11 Bom H. C Rep, 146.

This section would not allow the confessions of a respondent or co-respondent in a divorce suit to be used against the other, as they are not '*jointly tried for the same offence*,' but such confessions will be relevant under section 10

5 They must be tried for the *same offence*; so that when two persons were jointly tried for murder and one confessed to having abetted the murder and the charge against him was thereupon changed to abetment of murder, this section was held not to apply *R v Govind Babli Raul*, 11 Bom H C. Rep, 278.

6. As to the weight of such confessions see section 133 and notes thereon

Admissions not conclusive proof, but may estop.

31 Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

Note

1 As to estoppels see section 115 and notes thereon

2 An admission contained in a larger statement must be taken with the whole statement if qualified by the other parts of it.

Statements by persons who cannot be called as Witnesses.

Cases in which statement of relevant fact by person who is dead or cannot be found, &c, is relevant,

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

when it relates to cause of death;

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under

expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

or is made in course of business,

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

or against interest of maker;

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or gives opinion as to public right or custom, or matters of general interest,

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

or relates to existence of relationship;

(5) When the statement relates to the existence of any relationship (by blood, marriage or adoption,)* between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or is made in will or deed of deceased person;

(6) When the statement relates to the existence of any relationship (by blood, marriage or adoption)* between persons deceased, and is made in any will or deed relating to the affairs of the family

*Added by Act XVIII of 1872, Section 2.

to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or relates to transaction mentioned in Section 13, clause (a),

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, clause (a).

or is made by several persons, and expresses feelings relevant to matter in question

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations.

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts

(b) The question is as to the date of A's birth

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(*f*) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(*g*) The question is, whether A, a person who cannot be found, wrote a letter on a certain day The fact that a letter written by him is dated on that day, is relevant.

(*h*) The question is, what was the cause of the wreck of a ship

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(*i*) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the Village, that the road was public, is a relevant fact

(*j*) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact

(*k*) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(*l*) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact

(*m*) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(*n*) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

Note.

I Statements by persons who cannot be produced.

1 This and the following section are important exceptions to the rule that evidence must in all cases be direct The exceptional circumstances which make the statements in these sections admissible afford some guarantee to their truth.

2. The statements mentioned in these sections can be proved only if the pre- [illegible]

II. Clause 1.—Dying declarations.

1. This is an extension of the English Rule. The English Law requires for the admissibility of dying declarations the following conditions:—

(1) *The person should have been actually in danger of death and died.*

to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or relates to transaction mentioned in Section 13, clause (a),

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, clause (a)

or is made by several persons, and expresses feelings relevant to matter in question.

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact

(2) *He should have been aware of the fact that he was about to die, although he need not have expressed it in words.*

[This restriction is introduced, as it is presumed that there would be a guarantee to the truth of the statement if he was aware that he was soon to appear before God. On this ground the dying declaration of a child so young that it could have no idea of a future world was rejected. *R. v. Pyke*, 3 C and P., 598]

(3) *The inquiry must not be of a civil nature; and the subject of the charge should be the death of the deceased; i. e, the case must be one of homicide.*

(4) *The subject of the dying declaration must be circumstances of the death*

The requirements of this Act are .

(1) *The person must have died*

(2) *It is not necessary that he should have been conscious of approaching death.*

(3) *The proceeding need not necessarily be criminal, it must be one in which the cause of that person's death comes into question.*

[See Illustration (a) 2nd part]

(4) *The subject of the dying declaration must be the cause of that person's death or any of the circumstances of the transaction that resulted in his death*

[illegible]

revenge.

III. Clause 2.—Entries in books of account.

1 *The reasons for admitting them* —There is a presumption in favour of their [illegible]

proving them.

2. The English Law requires three conditions to be fulfilled before such an evidence can be admitted —

(1) *The person who made the entry must have had a personal knowledge of the fact recorded.*

(2) *The entry must have been made contemporaneously with the fact*

(3) *The fact entered must not be one which it was not the strict duty of the person to record.*

These restictions are not retained in the Act. These facts may however affect the weight to be given to the evidence.

3. The entry must be proved to be in the writing of the person who is alleged to have made the entry by producing a witness who has seen him write it or who is acquainted with his hand-writing.

IV. Clause 3.—Statements against interest.

1. These are made admissible, because it is presumed that no man will make a statement detrimental to himself unless it is true.

2. Even in English Law in the case of statements against interest it is not necessary as in the case of entries in books of account that the person who made the entry must have had a *personal knowledge* of the fact recorded and that the entry should have been made *contemporaneously* with the event. Not only may the statements against interest be proved but also collateral facts recorded along with such statements in explanation of them may be proved

3 It must be noted that statements against the interest of the person making them regarding relevant facts are admissions and can be proved against the person making them even while he is alive. But if he is dead or cannot be produced as witness for any other cause they can be proved against any one.

[illegible]

recover a large amount of money.

6 The *interest* mentioned in this clause is of four kinds :—

(1) *Pecuniary Interest*, (2) *Proprietary Interest*, i. e, interest in lands, &c (3) *Interest in escaping a criminal prosecution*, (4) *Interest in escaping a suit for damages* In English Law statements against the last two kinds of interest are inadmissible against third parties. *Sussex Peerage Case*

7. *Against the party making it* —Here "*make*" does not necessarily mean [illegible] given in order that it may be taken as the person's statement.

8 *Would have exposed him* —This means that at the time the person made those statements there must have been the danger of being liable to be exposed to a criminal prosecution or to a suit for damages

V. Clause 4.—Opinions as to public right or custom, &c.

1. The reasons for the admission of such are :—

(1) The rights being of ancient and obscure origin and being acted upon only at distant intervals of time, direct proof of their existence ought not to be required

(2) Being matters in which all persons in the neighbourhood are interested all are likely to be conversant ; therefore what each drops in conversation regarding it is likely to be true, otherwise it will be then and there contradicted. Thus a trustworthy reputation regarding them is likely to arise

2 This evidence cannot be admitted in the case of private rights and interests ; for respecting these, no trustworthy reputation is likely to arise, and it is possible to give direct evidence regarding them.

3 As safeguards for the truth of the declarations, the Act provides that they must be the declarations of persons likely to have competent knowledge, and that they must have been made before any controversy regarding the matter had risen.

[illegible] in the Act, and it requires in all cases some evidence that the declarant is likely to have had knowledge on the subject

5 *Interest* here means that which affects a person's legal rights or liabilities *The statement must have been made before any controversy arose on the subject.* The statements will be inadmissible if they were made after a controversy on the [illegible]

5 *Same parties or their representatives in interest* —It must be shown that the [illegible]

sentative in interest of a second adopted son whose adoption took place after the death of the first

It is not necessary that the parties in the two proceedings must have occupied the same situation It is sufficient that every party in the second was represented in the first, and all those who are opposed to each other in the present suit were opposed to each other in the previous suit

6 *The adverse party must have had the right and opportunity to cross-examine* —It must be shown that he had both the right and the opportunity to cross-examine If the adverse party had been allowed to cross-examine although he had not the right, it is questionable if the evidence would be admissible.

There are a few exceptional instances in Indian Law in which such evidence is admitted, even though the adverse party had not the right or opportunity to cross-examine See sections 510 and 512 of the Crim Pro Code of 1882 These exceptions are founded on necessity

7 *The questions in issue must be substantially the same* —It is not necessary [illegible]

[illegible]

Statements made under special circumstances.

Entries in books of account when relevant

34 Entries in books of account, regularly kept in course of business, are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration.

A sues B for Rs 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt

Note.

[illegible] books.

2 *Regularly kept in the course of business* —The book must not have been prepared for the purposes of the suit or kept at irregular intervals.

3 *Whether the entries should have been contemporaneous with the transaction* is a question which affects only the weight to be attached to the evidence.

4 In the case of the books of account of a Company, the entries are sufficient evidence as between the shareholders (Act VI of 1882, s 198)

5 These entries are insufficient to charge any person with liability unless corroborated by other evidence

6 *Mode of producing the entry in proof*—See sections 62, 141, 394 and 395 of Civ Pro Code of 1882, and s 65 clause (*g*) of this Act

Entry in public record, made in performance of duty enjoined by law, when relevant

35 An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

Note

[illegible]

in which it is kept

3 The term *public or official book* is not defined in the Act, but it must be explained with reference to s 74 on public documents

The term *public servant* is perhaps to be understood in the sense attached to it in the Indian Penal Code, s 21.

4 Such entries will be producible in evidence, although the person who made the entry is alive and producible

5 *The weight to be given to such entries*—Very often they are conclusive evidence of the facts stated therein; *e g*, a certificate of marriage granted under Part VI of the Indian Christian Marriage Act of 1872

Official reports expressing opinions on private rights are not to be regarded as having judicial authority or force But as reports of public officers made in the course of duty and under statutable authority they are entitled to great consideration *Raja Muthu Ramalinga Setupati v. Periyanayagam Pillai*, L R 1 I A, 209, 238

6 *Mode of proof*—As to the mode of proving these entries see sections 76—78 of this Act.

Maps and plans when relevant.

36 Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts

Note

1. Maps or plans made by Government for private purposes are not admissible under this section

2 *Survey Maps* are not evidence of *title* but they are evidence of possession. *The Collector of Rajshahe v Durgā Sundari Debia*, 2 W R Civ Rul, 210

3 As to the effect of evidence of Maps see ss 83 and 87

Statement as to fact of public nature contained in any Act or Notification of Government, when relevant

37 When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a Notification of the Government appearing in the *Gazette of India*, or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the *Government Gazette* of any colony or possession of the Queen, is a relevant fact

Note

1 See section 78 as to the mode of proof, and section 87 as to the effect.

2 See section 113 as to the effect of a notification of a cession of territory.

Statements in law books

38 When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Note

As to the other modes of proving the law of a foreign country, see section 45 and section 78 clause 4 of this Act and 22 & 23 Vic cap. 63 and 24 Vic cap 11 referred to in the notes to s 45, and as to presumption in such cases see section 84

How much of a statement is to be proved.

What evidence to be given when statement forms part of a conversation, document, book or series of letters or papers

39 When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to

the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

Note

The old rule of English Common Law was that, when one party had put in an extract from a document, the other party could put in the whole But afterwards the rule of Common Law was made the same as in this section, only those parts which explained or modified in any way the effect of the part already put in being now producible

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Judgments of Courts of Justice when relevant.

40 The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

Previous judgments relevant to bar a second suit or trial

Note.

In connection with this section, the following sections of the Civil and Criminal Procedure Codes of 1882 must be read :—

1. Section 12 of the Civil Procedure Code :—

[illegible]

Explanation —The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

Therefore an *order admitting a plaint* would be a bar to the admission of the same plaint in another Court.

2. Sections 13 and 14 of the Civil Procedure Code —

[illegible]

14. No foreign judgment shall operate as a bar to a suit in British India—

(a) if it has not been given on the merits of the case

(b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India :

(c) if it is in the opinion of the Court before which it is produced contrary to natural justice
(d) if it has been obtained by fraud
(e) if it sustains a claim founded on a breach of any law in force in British India.

These sections relate to the subject of *res judicata*, i e, the exclusion of the trial of a suit or issue on the ground that it has been already heard and decided by a competent Court The reasons for precluding the parties from re-opening a question which has already been heard and decided by a competent Court are the maxims—*nemo debet bis vexari, si constat curiæ quod sit pro unâ eâdem causâ* *—and *interest reipublicæ ut sit finis litium* † In order that a former judgment may have the effect of *res judicata*, the following requisites must be fulfilled

I The matter directly and substantially in issue in the second suit or issue, must be the same matter which was *directly and substantially in issue* in the former suit

II. Such matter must have been *heard* and *finally* decided by the Court in the former suit

III The Court which decided such former suit must have been a Court of *jurisdiction competent to try* such subsequent suit in which such issue is subsequently raised

IV The former suit must have been a suit between the same parties or between *parties under whom they or any of them claim, litigating under the same title*

REQUISITE I In connection with this subject, Explanations I and II to section 13 must be read

res judicata in a subsequent suit. The only meaning that can be attached to the *ex parte* decree is that the party who made default has admitted the justice of the claim and not necessarily of the exact grounds upon which the claim is based

(2) In connection with Explanation II referred to, the following section of the same Code must be read

42 Every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute, and so to prevent further litigation concerning them.

Therefore if the plaintiff could claim the relief sought on either of two grounds he must allege both the grounds in the plaint, if he elected to sue only on one and he failed, he would not be allowed to sue again regarding the same subject

* No one ought to be twice harassed, if it is clear to the Court that it is for one and the same cause.

† It is for the benefit of the State that there should be a limit to litigation.

cata The same will probably be the case in India

In the American case of *Cromwell* v. *County of Sac* Feild, J., observed :—

In the case of *Houlett* v *Tarte*, 10 C B N S., 813, Willes, J , said —

"It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time go by But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action."

(4) The matter must have been *directly and substantially* in issue in the previous suit

REQUISITE II. *Such suit must have been heard and finally decided.*—With reference to this subject, read Explanations III and IV.

(1)

fresh suit

produced l

a fresh su

plaintiff withdraws from the suit without the permission of the Court, he cannot again bring the suit (Civ. Pro Code, s 373)

(2) If the matter is decided in the lower court but left undecided on appeal, the matter must be considered as having been left undecided *Chandra Kumar Mitter* v *Sib Sundari Dasi* I. L R 8 Cal , 631.

(3) An *ex parte* decision is not *final* so long as it is open to the parties to reopen it on application to the Court

REQUISITE III. The Court which decided the previous suit must have been competent to decide the latter.

(1) A Magistrate, acting under Chapter XII of the Code of Criminal Procedure, is competent to decide only the fact of possession and not of title or ownership

(2) *Judgment of Foreign Courts.*—Foreign Courts will have jurisdiction, if (*a*) the subject matter was so situate as to be within the lawful control of the State under the authority of which the Court sits, and (*b*) the Court is authorized by the Sovereign of that State to decide disputes in connection with it *Castrique* v *Imrey*, L. R 4 E & I. A , 427. As to the various ways in which a foreign judgment may be set aside see s 14 of the Civ. Pro. Code, quoted above.

REQUISITE IV. The parties must be the same as those in the previous suit or the privies of those in the previous suit. In connection with this read Explanation V. A Hindu widow fully represents the estate ; and the reversionary heirs are bound by a judgment recovered against her if there be no fraud or collusion *The Shivaganga Case*, 9 M I A , 539

3 Section 43 of the Civil Procedure Code —

Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies, but if he omits (except with the leave of the Court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

An order admitting a plaint, in which the whole claim has not been made or all the remedies have not been asked for, will under this section prevent the institution of a fresh suit for the part omitted in the previous suit.

4. Section 403 of the Criminal Procedure Code.—

[illegible]

A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, paragraph 1.

A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happend, at the time when he was convicted.

A person acquitted or convicted of any offence constituted by any act may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence *constituted by the same acts which he may have committed, if the Court by which he was first* tried was not competent to try the offence with which he is subsequently charged

Explanation—The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or entry made upon a charge under section 273, is not an acquittal for the purposes of this section.

Accordingly a plea of *autrefois convict*, or *autrefois acquit** bars a second trial The principle of this section is expressed by the maxim, "*nemo debet bis puniri pro uno delicto*"†

5. As to the mode of proving previous judgments see sections 76 and 77 of this Act and s 511 of the Cr Pro Code.

Judgments in probate, &c, jurisdiction.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, (order or decree ‡) declares it to have accrued to that person;

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* A previous lawful conviction or lawful acquittal.

† No man shall be punished twice for the same offence.

‡ Added by Act XVIII of 1872, Section 3.

that any legal character which it takes away from any such person ceased at the time from which such judgment (order or decree *) declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment (order or decree *) declares that it had been or should be his property.

Note

1 This section is founded upon the elaborate judgment of Sir Barnes Peacock, C J, in *Kanhya Lal v Radacharan*, 7 W R Civ Rul, 339 (See Select Committee's Report)

2 The judgments mentioned in this section are called *judgments in rem* Another similar phrase is *rights in rem* *In rem* means prevailing against all people. [illegible]

judgment which is conclusive against all persons, the effect of which cannot therefore be disputed even by those who were not parties to the suit in which such judgment was given.

[illegible]

fact that persons who had no interest in the suit, although they had notice of the suit, could not have intervened in the suit which resulted in a judgment *in rem*. Judgements that a property is joint-family property and that an adoption is valid are not *judgments in rem*

4 *The judgment alone conclusive* —It must be remembered that in the case of [illegible]

between third parties

5 *Another class of orders which are conclusive.*—Orders passed under section 153 of the Indian Companies' Act, 1882

Judgment, order or decree between third parties when irrelevant and when not

42. Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies

* Added by Act XVIII of 1872, Section 3.

The existence of a decree in favor of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists

Note

The nature of a class of tenures called 'Ghatwali tenures' in Bengal and the effect of the permanent settlement upon it was held to be a public matter and a previous *judgment regarding it was admitted Raja Nilmoni Sing v Bakranath Sing and the Secretary of State for India*, P C, 10th March 1882.

43 Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42 are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act

What judgments, &c, are not relevant

Illustrations.

(*a*) A and B separately sue C for a libel which reflects upon each of them C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither

A obtains a decree against C for damages on the ground that C failed to make out his justification The fact is irrelevant as between B and C

(*b*) A prosecutes B for adultery with C, A's wife

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was A's wife

The judgment against B is irrelevant as against C.

(*c*) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction As between A and C, the judgment against B is irrelevant.

(*d*) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence

The existence of the judgment is relevant, as showing motive for a crime

Note.

1. [illegible]

2. *Instances in which a previous judgment is otherwise relevant* —Previous judgments may be relevant to show the motive of the parties, or as admissions, &c

3 When a previous judgment is in issue or is otherwise relevant, proof of it is conclusive as to the existence of the judgment and not as to the grounds of such judgment

4 With reference to this section read section 137 of the Civil Procedure Code of 1882

Fraud, collusion and incompetency of Court may be proved

44 Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion

Note

1 *Fraud* —The term '*fraud*' is divided by writers on Equity into two kinds, *viz*, *actual* and *constructive*

Actual fraud is applied to those cases in which there is an intention to commit a cheat or deceit upon another person to his injury By *constructive fraud* are meant "such acts or contracts as although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet

The Indian contract Act, section 17, defines fraud as follows.—

Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract —

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true,

(2) The active concealment of a fact by one having knowledge or belief of the fact,

(3) A promise made without any intention of performing it,

(4) Any other act fitted to deceive,

(5) Any such act or omission as the law specially declares to be fraudulent

Explanation —Mere silence as to facts, likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech

a subsequent suit, without having the previous judgment set aside by the Court which passed it As to guilty parties the case is doubtful; most probably they will fall under the general rule, that a person will not be allowed to set up his own fraud.

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* Evil intention

† A person alleging his own infamy is not to be heard.

‡ No one can be relieved or gain an advantage from his own deceit.

Opinions of third persons, when relevant

45 When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art (or in questions as to identity of handwriting*) are relevant facts.

Opinions of experts

Such persons are called experts

Illustrations

(*a*) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b*) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant

(*c*) The question is, whether a certain document was written by A Another document is produced which is proved or admitted to have been written by A

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

Note

1. *Foreign Law*—There are various ways of proving a point of foreign Law.—

(1) Sections 38, 45 and 78 cl 4 of this Act.

(2) 22 & 23 Vic. cap. 63 "When an action is pending in any Court in Her Majesty's Dominions, the Court may, if it deems it material to ascertain the law in any other part of such Dominions, cause a case to be prepared and remit the case for the opinion of one of the superior Courts of such other part, praying for the opinion of the Court upon it a certified opinion of such Court is given to each of the parties and either of them may ask the first Court to apply it to the case."

(3) 24 Vic. cap. 11 [illegible]

[illegible] pleaded in the Courts of such foreign State.

Foreign Law includes usages and customs of a foreign country having the force of law.

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* Added by Act XVIII of 1872, Section 4

2 *English Law regarding the opinions of experts on Foreign Law*—Only those who carry on a legal profession in a foreign country can give opinions as to *foreign law* *Mere* students of *foreign law* cannot do so. In the latter case the Court should itself consult foreign law books with the help of explanations given by such students

Under this section the opinion of a person having sufficient skill in the subject will be admitted, whether he is engaged in the profession or not.

3 *Science or Art*—This includes all subjects in which a course of special study or experience is requisite to the formation of an opinion; and does not include those subjects in which every person can pass an opinion, *e. g*, a question of legal or moral obligation

In *McNaughten's case*, 10 Cl and Fin, 200, it was held that a medical man who was present at the trial cannot be asked whether, from the evidence given, he concludes that the prisoner was insane at a particular time. For this involves a decision as to the truth of the evidence, which is a question to be decided by the jury and not by the medical man The proper question to be put to him is "Supposing the facts given in evidence are true, do you believe that the prisoner was insane at the time?"

4 *A person especially skilled* is a person who from his position and employment has exceptional means of knowledge or has given the subject particular consideration Before a person's opinion is admitted under this section evidence of special skill must be given

5 *Handwriting.*—The handwriting of a person may be proved in seven ways —

(1) Calling *the writer himself* Section 70

(2) Calling a person *who has seen the person write the particular writing* under consideration Sections 67, 68, 69.

(3) Calling a person who has obtained an acquaintance with the handwriting of the person who is alleged to have written it, *by having seen that person write on other occasions* Section 47.

(4) Calling a person who has obtained an acquaintance with the handwriting of the person by *having received documents purporting to be written by that person in answer to documents written by himself* Section 47.

(5) Calling a person who has acquired a knowledge thereof *by having seen in the ordinary course of business* documents proved, or which may be reasonably presumed to have been, written by that person Section 47.

(6) The *judge himself comparing a disputed signature with admitted signatures* Section 73

(7) *An expert* doing the same. Section 45

A person, who is not an expert but who has acquired for the purposes of the case a knowledge of the particular person's handwriting by looking at various documents admitted to have been in his handwriting, must not be allowed to give his evidence

6 As to scientific treatises and the right of giving them in evidence see s. 60. As to the mode of proving experts' opinions see s 60 As to the proof of the examination of Civil Surgeons and of the opinion of Chemical Examiner see ss. 509 and 510 of Criminal Procedure Code of 1882.

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant, if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(*a*) The question is, whether A was poisoned by a certain poison

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant

Note

This section is analogous to section 11.

Opinion as to handwriting

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C nor D ever saw A write

Note.

See notes on section 45 for proof of handwriting.

Opinion as to existence of right or custom, when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section

Note

The expression *general custom or right* includes what in English Law is known as *public custom or right*. See note to section 32, clause 4

Opinions as to usages tenets, &c, when relevant

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

Note.

In connection with this section read section 92 post.

Opinion on relationship when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code.

Illustrations.

(*a*) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(*b*) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

Note.

In English Law the rule laid down in this section applies only to cases of marriage. But in this Act it applies to all cases of relationship.

Grounds of opinion, when relevant

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

Note

[illegible]

Character when relevant.

In civil cases character to prove conduct imputed, irrelevant

52 In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

Note.

1. This is a limitation of section 11.

2. *Character* may itself be in issue in a civil case as in an action for libel; then evidence of character may be given.

3 *Character* is distinct from '*state of mind*' which may be relevant under section 14

4. *Persons concerned* means those whose conduct is relevant to the suit and not mere witnesses Evidence of character of the witnesses may be given always for the purpose of affecting their credibility. See sections 145, 146, 153, 155.

In criminal cases, previous good character relevant.

53 In criminal proceedings, the fact that the person accused is of a good character, is relevant.

Note.

[illegible] crime might have been absent.

54 In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Previous conviction in criminal trials is relevant but not previous bad character except in reply

Explanation—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Note.

1 Evidence that the accused is of bad character is primarily inadmissible; for bad character is a thing common to the accused and a large number of persons in the world, it does not therefore tend to show that the accused himself committed the crime But when evidence of good character has been given to raise a presumption of innocence in favour of the accused, evidence of bad character may be given to rebut that presumption

2 Note that the evidence of the bad character of the *accused alone* is excluded, and not the evidence of bad character of the opposite party; in cases of rape evidence of bad character of the prosecutrix may be given See s 155 cl 4

3 *Evidence of previous conviction*—It is doubtful if evidence of previous conviction would be relevant to establish the probability of the prisoner having committed the offence for which he is tried It is not so in English Law, and it would probably be the same under this Act It is certainly relevant for the purpose of *enhancing punishment Read s 221 of the Cr. Pro Code of 1892*

55 In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant

Character as affecting damages

Explanation.—In sections 52, 53, 54 and 55, the word "character" includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Note

1. *That the character of any person is such as to affect the amount of damages which he ought to obtain is relevant*—Therefore under this section the character of persons other than the one claiming damages is not relevant But if the character of other persons is likely to affect the amount of damages, evidence of it will be

2 In a case of damages for defamation in England it is doubtful, if evidence of the bad character of the plaintiff will be admissible in mitigation of damages In India, it would be admissible provided evidence is confined to general reputation and general disposition

3. *Reputation* is what is thought of a person by others *Disposition* is the frame of the mind of a person *Reputation* arises from, and *disposition* is inferred from, the outward actions of a person.

[Text writers usually mention four cardinal principles of the Law of Evidence —

1 The case proved must correspond substantially with the allegations, else the plaintiff will obtain no relief

This is a rule more of *procedure* than of *evidence*

2. The evidence must be confined to the points in issue

This is the subject which the last chapter has treated of.

3 The burden of proof lies on the party holding the substantial affirmative

This is comprised in the provisions of Chapter VII of this Act.

4 The best evidence must be given

This is the governing principle of Chapters IV & V]

PART II.

ON PROOF

CHAPTER III.—Facts which need not be proved

No evidence required of fact judicially noticed

56 No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts :—

(1) All laws or rules having the force of law now or heretofore in force, or hereafter to be in force, in any part of British India :

(2) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed :

(3) Articles of War for Her Majesty's Army or Navy :

(4) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established

under the Indian Councils' Act, or any other law for the time being relating thereto ·

Explanation.—The word "Parliament," in Clauses (2) and (4), includes—

1 The Parliament of the United Kingdom of Great Britain and Ireland,

2. The Parliament of Great Britain;

3 The Parliament of England,

4 The Parliament of Scotland, and

5. The Parliament of Ireland

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6) All seals of which English Courts take judicial notice: the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the Official Gazette of any Local Government:

(8) The existence, title, and national flag of every State or Sovereign recognized by the British Crown:

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the Official Gazette:

(10) The territories under the dominion of the British Crown:

(11) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons:

(12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders and other persons authorized by law to appear or act before it.

(13) The rule of the road (on land or at sea*.)

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Note

1 *Acts of Parliament*—A *public or general Act* is a universal rule applying to the whole community, and must be judicially noticed by the Courts A *special or private* Act operates only upon particular persons or private concerns, and is not judicially noticed, unless it is directed by a clause in the Act that it should be so noticed.

The Acts of Parliament are usually divided into —

(1) *Public General Acts*, (2) *Local and Personal Acts* declared public and to be judicially noticed, (3) *Private Acts* printed by the Queen's Printer, which may be proved by printed copies, (4) *Private Acts* not printed

By 13 and 14 Vic. Cap 21, section 27, it is provided that every Act of Parliament passed after the 4th February 1851, shall be deemed public and shall be judicially noticed unless otherwise expressed therein.

2 *Recognition of Independent State*—Read also s 431 of the C P. C

3 *The Court may resort for its aid to appropriate books*—This is an extension of the English rule which allows *experts* to refer to books to refresh their memory.

4 *The Court may refuse to take judicial notice*—In *Van Omeron v Dowick*, 2 Camp Rep, 44, the Court refused to take judicial notice of the King's Proclamation, the counsel not having been ready with a copy.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Facts admitted

Note

1. Read Civ Pro Code of 1882, ss. 117 and 128

2 When a document is produced and the adverse party does n[illegible] it, it must be taken as proved *Babi Talai Sherob v. Beglar*, 6 M. I. A., 621.

* Added by Act XVIII of 1872, Section 5

CHAPTER IV.—Of oral Evidence.

Proof of facts by oral evidence

59. All facts, except the contents of documents, may be proved by oral evidence.

Oral evidence must be direct

60. Oral evidence must, in all cases, whatever, be direct; That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds :

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Note.

Opinion of experts contained in treatises.—These are admissible on proof of three things—(1) That the author is an expert, (2) That the treatise is commonly offered for sale, and (3) That the author cannot be produced

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CHAPTER V.—Of documentary Evidence.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

Note.

1 This section must be taken subject to the provisions of the Stamp and Registration Acts and the provisions of ss. 61 73 of this Act. Read Registration Act of 1877, ss 17 and 18.

2 If a document creates two *distinct* rights for one of which the document must have been registered and for the other need not have been so, the document though unregistered may be used for proof of the latter *Gour Churn Surma* v. *Jinnut Ali*, 11 Cal, 176

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1—Where a document is executed in several parts, each part is primary evidence of the document:

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original

Note.

The counterparts are secondary evidence of the contents of the document as against those who did not execute them See s 63, clause (4)

Secondary evidence.

63. Secondary evidence means and includes—

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

(4) Counterparts of documents as against the parties who *did not execute them;*

(5) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Note

1. If a number of copies be made by a copying machine from an original, the copies are primary evidence of each other and secondary evidence of the original See s 62 Explanation 2, and s 63 clause (2)

2. A copy made from or compared with a copy is not secondary evidence of the original unless the latter-mentioned copy was made from the original by a mechanical means such as photography or lithography See clause (2) and illustrations (b) and (c)

3 *A printed copy* is not secondary evidence under clause (2); for printing is not a process which in itself insures the accuracy of the copy. But it will be deemed secondary evidence under clause (3)

3 See sections 76 and 77 as to certified copies.

4 Other kinds of secondary evidence not mentioned in this section are *written admissions of the contents of a document* [see s 65 clause (b)], and *oral admissions of the same* (see s 22)

Proof of documents by primary evidence.

64 Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Note.

1 In English Law, on the authority of *Slatterie* v. *Pooley* referred to in the notes to s 22, it is held that an oral admission of the contents of a document is primary evidence of the document Not so in India See s 22.

2 *The effect of alteration in a document.*—An *unauthorized* alteration of a document in a *material* point while in *the possession or under the control of the person producing it* renders it wholly invalid

Cases in which secondary evidence relating to documents may be given

65. Secondary evidence may be given of the existence, condition, or contents of a document, in the following cases:—

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it:

(*b*) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c*) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d*) When the original is of such a nature as not to be easily moveable;

(*e*) When the original is a public document within the meaning of section 74;

(*f*) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(*g*) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*) and (*d*) any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Note.

1 Secondary evidence cannot be given, when the original is inadmissible for want of registration *Dıvelhı Varada Ayyangar* v. *Krishnasamı Ayyangar*, I. L. R. 6 Mad, 117.

2 [illegible]

An exception has been introduced by the legislature to this clause in favour of merchant seaman to the effect that they may bring forward secondary evidence of their agreement with the master of the ship without producing or giving notice to produce the document. 17 & 18 Vic. c 104, s. 164.

Clause (*b*) *Written admissions*—A written admission may be tendered in evidence even without accounting for the non production of the original; not so an oral admission See s 22.

4. *Clause (c.) Original destroyed or lost* —In cases of loss, strict proof of

Exception to this clause —Section 19 of the Limitation Act of 1877 provides as follows.—

If before the expiration of the period prescribed for a suit or application in respect of any pro-

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, *but oral evidence of its contents shall not be received*

The question is whether the portion italicised at the end excludes oral evidence, even when the written acknowledgment is proved to have been lost or destroyed. *Mr. Cuningham* thinks that the passage only means that oral evidence is not admissible

5 *Clause* (d) *Illustration* —An inscription upon a tombstone.

6 *Clause* (g) *General result of the whole collection.*—See Civ. Pro. Code of 1882, s. 394.

8. In English Law in *criminal* cases, in the case of public documents the original itself must be produced. But this section applies equally to *civil* and *criminal* cases.

Rules as to notice to produce.

66. Secondary evidence of the contents of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, (or to his attorney or pleader*) such notice to produce it as is prescribed by

* Added by Act XVIII of 1872, Sec. 6

law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it —

(1) When the document to be proved is itself a notice;

(2) When, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force,

(4) When the adverse party or his agent has the original in Court;

(5) When the adverse party or his agent has admitted the loss of the document,

(6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Note

1 In connection with this section read ss 59, 60, 63, 70, 79, 131—134, 163, 164 of the Civ Pro Code of 1882, and ss. 94—97 of the Crim. Pro Code of 1882 and ss 162—164 of this Act

2 Persons omitting to produce documents after service of notice may be proceeded against under s 175 of the Indian Penal Code

3 [illegible] production of secondary evidence if he had handed it over subsequently to the notice.

4 For an instance under clause (6) see *Ralli v Gau Kim Swee*, I. L. R. 9 Cal, 939.

5 *Court may dispense with notice* —In England the court has no such discretion

Proof of signature and handwriting of person alleged to have signed or written document produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Note

1. It is not necessary that the handwriting must be proved by a witness who saw the document written by the person in question All that this section requires is that the handwriting must be proved In *Neel Kanto Pandit* v. *Juggobhundoo Ghose*, 12 B L R, Ap, 18, the handwriting was proved by the admissions of the person who was alleged to have written it

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in court

3 As to the presumption in case of documents which are thirty years old, see section 90

68 If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence

Proof of execution of document required by law to be attested

Note

1 An *ancient* document may be admitted without the proof required by this section See s 90

2. Documents required to be attested are *wills, mortgage deeds, lease deeds, gift deeds, &c*

3 *An exception* —The Merchant Shipping Act, 17 and 18 Vic, c 101, s. 526, provides that any document required by the Act to be executed in the presence of witnesses may be proved by any person capable of giving evidence to the requisite facts without calling any attesting witness

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Proof where no attesting witness found.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Admission of execution by party to attested document

Note.

In English Law a person who executed a document cannot admit the execution of a deed which requires attestation so as to dispense with proof of it by the attesting witness, when an attesting witness can be called; the reason assigned being that

[illegible] which the party himself is [illegible] This section makes the [illegible]ness of the document as

Proof when attesting witness denies the execution

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Note.

The section does not say whether, when one of several attesting witnesses has been called and has denied or does not recollect the execution of the document, another attesting witness should be called.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Comparison of handwriting.

73 In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

Note

The English law on the subject was that the comparison of signatures may be [illegible] been made the same as this section. In criminal cases it still remains different

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Public Documents.

Public Documents.

74. The following documents are public documents:—

1. Documents forming the Acts, or records of the Acts—
   (i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, whether of British India or of any other part of Her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

Note.

Wills admitted to probate are public records kept in British India of private documents, and are therefore public documents.

Private documents. **75.** All other documents are private.

Certified copies of public documents. **76.** Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the oridinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Note.

The various public documents which may be inspected by the public and of which copies may be had are:—

(1) Registers kept in Registration offices. (See sections 17, 18, 42, 51 and 57 of the Registration Act III of 1877.)

(2) Marriage Registers kept under the Christian Marriage Act, XV of 1872; (See sections 79 and 80 of the Act.)

(3) Declaration of the Keepers of Printing Presses, &c. (See s. 6 of Act XXV of 1867.)

(4) Register of the copy-right of books. (See section 3 of Act XX of 1847.)

(5) Documents kept by the Registrar of Joint Stock Companies. [See section 220 cl. (c) of Act VI of 1882.]

(6) Books kept by the Administrator-General. (See s. 43 of Act II of 1874.)

(7) The Records of Civil Courts. (See ss. 217 & 580 of the Civ. Pro Code.)

(8) The Records of Criminal Courts. (See ss. 210, 219, 371, 548 of the Crim. Pro Code.)

Production of such copies

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of other official documents

78. The following public documents may be proved as follows:—

(1.) Acts, orders, or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,

by the records of the departments certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2) The proceedings of the Legislatures,

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government

(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer:

(4) The Acts of the executive or the proceedings of the legislature of a foreign country,

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or Sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council:

(5) The proceedings of a municipal body in British India,

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6) Public documents of any other class in a foreign country,

by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a notary public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

Presumptions as to Documents.

Presumption as to genuineness of certified copies

79 The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Note.

The presumptions regarding documents known to English Law do not find a place here They can only be raised under the provisions of s. 114

Presumption on production of record of evidence.

80 Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

Note.

1. As to the mode in which evidence should be taken in a civil case, see Civ. Pro Code chap XV. As to the same in Criminal cases, see Crim. Proc. Code chap XXV; and as to confessions see s. 164.

same Code provides as follows :—

Presumption as to Gazettes.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gaztte of India*, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by Law and is produced from proper custody.

Presumption as to document admissible in England without proof of seal or signature.

82. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judical or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

Proof of maps made for purposes of any cause

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

Presumption as to collections of laws and reports of decisions

and of every book purporting to contain reports of decisions of the Courts of such country

85. The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated

Presumption as to powers of attorney

Note.

See s 33 of the Registration Act III of 1877

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Presumption as to certified copies of foreign judicial records.

Note

Read Civ Pro. Code, s 13, Explanation VI

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Presumption as to books and maps.

88 The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be

Presumption as to photographs, machine-copies, and telegraphic messages.

sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to due execution, &c, of documents not produced

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped, and executed in the manner required by law.

Note

With this section read sections 66 and 164 of this Act.

Documents thirty years old

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation —Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations

(*a*) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper

(*b*) A produces deeds relating to landed property of which he is the mortgagee The mortgagor is in possession. The custody is proper.

(*c*) A, a connection of B, produces deeds relating to lands in B's possession, *which were deposited with him by B for safe custody*. The custody is proper

Note

1 In English Law, an *ancient document*, i e, a document more than thirty years old need not be proved, provided it came from proper custody.

2 What is proper custody depends upon the circumstances of the case

3 [illegible]

CHAPTER VI.—Of the Exclusion of Oral by Documentary Evidence.

Evidence of terms of written contract.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills (admitted to Probate in British India*) may be proved by the Probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants, or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(*a*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c*) If a bill of exchange is drawn in a set of three, one only need be proved

* Substituted by Act XVIII of 1872, Section 7.

(*d*) A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo The evidence is admissible

(*e*) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible

Note

1 *Matters required by law to be reduced to the form of a document* :—

(1) Depositions of witnesses in civil cases, ss 182—190, Civ Pro Code.
(2) Depositions of witnesses in criminal cases, ss 354—362, Crim Pro Code.
(3) Judgments and decrees in civil cases, ss 571—579, Civ Pro. Code
(4) Judgments and final orders of criminal courts, s 367, Crim. Pro Code.
(5) The examinations of accused persons*, s 364, Crim Pro. Code
(6) An acknowledgment to save the statute of limitation, s 19, Limitn Act.
(7) An agreement without consideration, s 25, Indn Contract Act.
(8) Agreements to refer to arbitration, s 28, Excep 2, Indn Contract Act.
(9) Mortgages of immoveable property, s 59, Trans Prop. Act.
(10) Leases of immoveable property, s 107, Trans Prop. Act.
(11) Gifts of immoveable property, s 123, Trans Prop. Act
(12) Wills s 50, Indn Succn Act, and s 2, Hin. Wills Act.

The Hindu Law does not in any case require any matter to be reduced to the form of a document

2. The expression, "*all cases in which any matter is required by law to be reduced to the form of a document*," does not include all transactions of which the law directs a documentary record to be kept. Therefore *births, deaths, marriages, &c*, of which the law directs a documentary record to be kept, may be proved by oral evidence.

3 *Have been reduced to the form of a document* —In the following cases the contract has not been reduced to the form of a document —

(1) Where at the time of letting a premises, the lessor reads out from pencil minutes the terms of the lease and the lessee, though assenting, does not sign the minutes

(2) Where the terms of a lease are signed by the wife of the lessee who is neither present nor has authorized her to act as his agent

(3) Where the terms upon which a servant is hired are recorded in the presence of a constable, but the record is signed neither by the master nor by the servant.

The contract is said to have been reduced to the form of a document, only when the writing in question, is such as to raise the presumption that the parties intended it to operate as fit evidence of their agreement.

4 *Bought and Sold Notes*.—These are the notes which a broker sends to the

[illegible]

true one, the contract can be proved only by the *bought* and *sold notes* or by secondary

* See Note to s. 60, page 64.

evidence of their contents; and no other evidence to vary their effect can be given. If the latter view be the true one, the *bought* and *sold notes* form only one of the means of proving the contract; and parol evidence may be given even to vary the effect of the bought and sold notes.

It may be now considered as settled that the *bought* and *sold notes* are not necessarily the contract itself; it may be proved that they are only memoranda of a contract already concluded, unless there is any mercantile usage to the contrary.

should be charged, it was put forward by the plaintiff that he had in fact received subsequently a letter from the defendant allowing 5 per cent per mensem interest and that he thereupon endorsed the note as cancelled, held, by *Holloway*, J, that evidence *dehors* the promissory note was not admissible to show the rate of

6 The *consideration* for a contract may be proved by evidence other than the document.

7 *Admitted to probate in British India* —The exception in favour of wills proved in British India might very well have been extended to wills proved in England But such wills may be proved by probates under ss 74 and 77.

Probate means the copy of a will certified under the seal of the court of competent jurisdiction with a grant of administration to the estate of the testator (Section 3 of the Indian Succession Act, X of 1865) As to the granting of probate, read sections 208, 209, 235—264 of the same Act

8 Although the terms of the contract cannot be proved orally, the existence of the contract itself may be proved orally Therefore the fact that one of two persons is a tenant and the other is the landlord, or that two persons are partners, may be proved without the document.

9 Matters other than those contemplated in this section may be proved orally, although they may have been recorded in a document, therefore oral evidence of payment is not excluded by written receipt See illustration (*e*)

10 This section applies where there is an oral contract to abide by the terms of a previous written contract

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Exclusion of evidence of oral agreement.

Proviso (1)—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2)—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3)—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4)—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5)—Any usage or custom by which incidents not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6)—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

[illegible] pay B Rs 1,000 on the 1st [illegible] me, an oral agreement was [illegible] the 31st March, cannot be proved

(c) An estate called 'the Rampore tea estate' is sold by a deed which contains a map of the property sold The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment and accepts the goods on delivery B sues A for the price A may show that the goods were supplied on credit for a term still unexpired

(g) A sells B a horse and verbally warrants him sound A gives B a paper in these words: 'Bought of A a horse for Rs 500' B may prove the verbal warranty

(h) A hires lodgings of B, and gives B a card on which is written —'Rooms, Rs 200 a month' A may prove a verbal agreement that these terms were to include partial board

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money B keeps the receipt and does not send the money In a suit for the amount, A may prove this

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered

Note

1. It is doubtful if this section applies to *depositions* which are by law required to be reduced to the form of a document, for in the case of a *deposition*, oral evidence may be given to show that the statements of the witness were not correctly taken.

2. Oral evidence for the purpose mentioned in this section cannot be given only as between the *parties* It may be given as between *third parties*. See section 99, *post*

3. [illegible]

ple and policy: of *principle*, because such instruments are, in their nature and

origin, entitled to a much higher degree of credit than parol evidence: of *policy*, because it would be attended with great mischief, if those instruments upon which men's rights depend were liable to be impeached by *loose collateral evidence*."

4 *Proviso* (1). *Facts invalidating a document, &c.*—

"*Fraud*"—See Ind Cont Act, s 17, and Ind Succn Act, s. 48.

"*Intimidation*"—See Ind Cont. Act, s 15, and Ind. Succn. Act, s 48.

"*Illegality*."—See Ind. Cont. Act, ss. 23 and 24, Ind Succn Act, s 114, and Ind Pen. Code, s 43

"*Want of capacity*"—See ss. 11 and 12 of the Ind. Cont Act

(*a*) A party cannot however set up his own fraud; *i. e.*, he cannot try to get rid of the effects of a document which he fraudulently caused to be drawn up This is what is meant by saying that a party cannot both *approbate* and *reprobate* a document

(*b*) The *fraud* contemplated in this section is a fraud contemporaneous with the execution of the document and not one which arises after the execution [illegible] it was a fraud subsequent to the execution of the document

(*c*) *Mistake*—Extrinsic evidence is admissible to prove that certain words in a document must have been, from the very circumstances of the case, inserted by mistake *Hall* v *Cazenove*, 4 East, 477.

5 *Proviso* (2). *Separate oral agreement as to a matter on which the document is silent*—

The requirements of the Act on this point are—(1) That the matter is one as to which the document is silent, (2) That the matter is not inconsistent with the express terms of the contract, (3) That the document should not be so formal as to make it improbable that the parties did not reduce the whole of their contract to writing and left some portion understood

(*a*) The leading English case is *Abrey* v. *Crux*, L R 5 C. P, 37. In that case the drawer of a bill of exchange set up, as defence to an action by the payee, an oral agreement between the drawer and the payee that certain goods, belonging to the acceptor and deposited with the payee as security, should first be sold by the payee before he could sue the drawer This defence was held inadmissible

(*b*) The rule in the English Equity Court is that a transaction which is on its [illegible] 4 Bom, [illegible]

(*c*) Though oral evidence cannot be given to vary the terms of a written contract, oral evidence may be given to show *what the state of the document* was at the time when the document became a contract. *Stewart* v. *Eddowes*, *Hudson* v. *Stewart*, L R. 9 C P, 311.

(*d*) The omission of a provision for interest in a *hatchitta* would not prevent the admission of an oral agreement as to interest. *Umesh Chandra Banea* v. *Mohini Mohun Das*, 9 Cal, 301.

6 *Proviso* (3). *Oral agreement as to condition precedent*—It may be shown by parol evidence that what is apparently an absolute deed was delivered really as an *escrow**. *Annagurubalachetti* v. *Krishnasami Naiken*, 1 M. H. C. R, 457.

* An "*escrow*" is a writing deposited with a third person to be by him delivered to the person whom it purports to benefit upon the performance of some condition upon which only the writing is to have effect.

'*Nihil tam conveniens est naturali æquitate quam unum quodque dissolvi eo ligamine quo ligatum est.**'

The first thing that should be looked to before this exception can be applied is

M. H. C. R., 135, a custom inconsistent with the contract was not allowed to be proved. If there was an intention to exclude a contract from the operation of a custom, which would otherwise attach to it, the intention must be proved by the words of the contract itself and cannot be proved by other evidence, *Fawkes* v *Lamb*, 31 L. J., Q. B., 98. In the case of these mercantile customs the antiquity, uniformity and notoriety of custom need not be proved. See notes to s. 13 para 3. *Benami*† transaction is a recognised custom among Hindus.

9. *Proviso (6) Parol evidence to explain the language of the document.*—In *Patmanabhan Numbudri* v *Kunhi Kolendan*, 5 Mad. H. C. Rep., 320, evidence was admitted to show that a particular acknowledgment in writing, rather vague in its terms, referred to a particular property.

Exclusion of evidence to explain or amend ambiguous document

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a*) A agrees, in writing, to sell a horse to B for 'Rs. 1,000 or Rs. 1,500.'

Evidence cannot be given to show which price was to be given.

(*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Exclusion of evidence against application of document to existing facts

94. When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to B, by deed, 'my estate at Rampore containing 100 bigas.' A has an estate at Rampore containing 100 bigas. Evidence may not

* Nothing is so agreeable to natural equity as that a thing be unbound in the manner in which it was bound.

† A *benami* purchase is a purchase in the name of a person other than the real purchaser.

be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Evidence. as to document unmeaning in reference to existing facts

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense

Illustration

A sells to B, by deed, 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house at Howrah

Evidence as to application of language which can apply to one only of several persons

96 When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to

Illustrations

(*a*) A agrees to sell to B, for Rs 1,000, 'my white horse.' A has two white horses Evidence may be given of facts which show which of them was meant.

(*b*) A agrees to accompany B to Hyderabad Evidence may be given of facts showing whether Hyderabad in the Deccan or Hyderabad in Scind was meant.

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration

A agrees to sell to B, 'my land at X in the occupation of Y.' A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

Evidence as to meaning of illegible characters, &c.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration

A, a sculptor, agrees to sell to B 'all my mods' A has both models and modelling tools Evidence may be given to show which he meant to sell

Note.

[SECTIONS 93—98]

1. These sections relate to the construction of documents other than wills under the Indian Succession Act and the Hindu Wills Act (See section 100) The English rules on the subject applying even to wills are given by Mr. Taylor as follows —

RULE I. Where in a written instrument the description of the person or thing intended is *applicable with legal certainty to each of several subjects*, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author

RULE II. If the description of the person or thing be *partly applicable and partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be inadmissible.

RULE IV. If the description be wholly inapplicable to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe

RULE V. If the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect

RULE I, corresponds with section 96 Rule II, with section 97: Rules III and V, with section 95 and Rule IV, with section 94 while no distinction appears to be made in any case between *declarations of intention* and *other* evidence

These sections may be shortly stated thus —

Extrinsic evidence cannot be given where the document is plain and applies exactly to existing facts (s. 94), nor can it be given to remove a patent ambiguity or defect in the document (s 93) But extrinsic evidence may be given for the

the object is to show which set of circumstances was intended (s 97) (4) When words are used in a technical sense, &c., (s 98)

an ignorant person or one who has no knowledge of the circumstances under which it

was written cannot understand it It will be such, only if a person having competent knowledge finds it ambiguous Examples of *defect* are, 'I devise my house to——,' and 'I bequeath Rs ——to my son John.' But in a case of unintentional omission, as 'I bequeath 1,000 to my son John," the word Rs. or £ may be supplied before 1,000, if what was intended to be inserted can be discovered from the document itself

In connection with this read s 29 of the Ind Cont Act.

3 *Section* 94 —This section must be taken subject to the exception contained in section 98

4. *Section* 95 —This section is the embodyment of the rule of English Law, "*Falsa demonstratio non nocet.**"

This rule is applied in English law, only when part of the description applies only to one thing, and the other part does not apply to any thing at all But in order to apply this rule, *what is found applicable must render the thing sufficiently* definite

5 Whenever extrinsic evidence is admitted under sections 95—98, oral statements of the person making the document are admissible and it matters not whether these statements are prior to, contemporaneous with, or subsequent to, the making of the document, although these circumstances may affect the weight of the evidence.

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document, or their *representatives in interest, may give evidence* of any facts tending to show a contemporaneous agreement, varying the terms of the document

Illustration

A and B make a contract in writing that B shall sell a certain cotton, to be paid for on delivery At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C if it affected his interests

Note

Varying.—The question has been raised whether 'varying' in this section includes 'contradicting, adding to or subtracting from its terms' mentioned in s 92 Most probably it does

Saving of provisions of Indian Succession Act relating to wills

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

Note.

See *Indian Succession Act, ss 61--107*

* A false description does not vitiate the document.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE

CHAPTER VII —Of the Burden of Proof.

Burden of proof

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed

A must prove that B has committed the crime

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true

A must prove the existence of those facts

Note

Sections 101—104 lay down the general English rule on the subject of burden of proof Sections 105—110 lay down certain special rules casting the burden of proof on particular persons Sections 112 and 113 mention two instances of conclusive proof Section 114 gives a general authority to the Judge to draw reasonable inferences

On whom burden of proof lies

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies

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If no evidence were given on either side, B would be entitled to retain his possession

Therefore the burden of proof is on A.

(*b*) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

Note.

1 English Text-writers lay down two rules regarding the burthen of proof:—(1) It is on the party who would fail if no evidence at all were given on either side. (2) It is on the person who would fail if the allegation to be proved were struck out of the record

2. *Decided Cases*—(1) The burden of proving that the consideration for a sale has not been paid when it is expressed in the deed of sale as paid, or that the person in whose name the purchase was made was not the real purchaser, or that in any other way the real character of a transaction was different from its apparent character is upon the person who asserts that the real character was different. *Kali Persad Tewari v. Raja Sahib Prahlad Sen*, 12 M. I. A., 282; *Srimanchandra Dey v Gopal Chandra Chakravarti*, 11 M. I. A., Ap. 31.

(2) Where a Hindu family is admitted or proved to have been orginally living *jointly*, the burden of proving *partition* is upon the person who asserts it. *Mussumut Chitha v Babu Mihun Lal*, 11 M. I A, Ap. 380 While a Hindu family continues joint the burden of proving that a particular property is the self-acquisition of one member and not part of the joint property is upon the person claiming it as self-acquired *Sri Raja Yanamala Venkayama v. Sri Raja Yanamala Buchaiya Vankantara*, 13 M. I. A, Ap 333 That there has been reunion of the members of a joint Hindu family after partition must be proved by the person who asserts it.

[illegible] ...iking by gift ... it to be such. [illegible]

prove that those circumstances existed, or that, after due inquiry, he in good faith came to the conclusion that those circumstances existed. The burden of proof here is on the purchaser. *Cavaly Venkata Narainappa v. The Collector of Masulipatam*, 8 M. I. A., Ap. 529; *Hanuman Persad Panday v. Mussamut Bahni Manraj Kunwari*, 6 M I. A, 394; *Prasanna Kumari Debi v. Gulab Chand*, 14 B. L. R., 458. But a father under Mitakshara Law may sell away ancestral property for his own debts unless the debts were contracted for an immoral purpose. Therefore in the case of purchase from a father to clear father's debts, it does not lie upon the purchaser to show that the debts were not for an immoral purpose, but the burden is upon the person who seeks to set aside the sale to show that the debts were for an immoral purpose. *Girdhari Lal v. Kantu Lal*, L. R, 1 I. A, 328.

(3) As *fraud* cannot be presumed on the part of any person, a person, seeking to set aside a contract on the ground of *fraud*, must give distinct evidence of it. *Rajendar Narain Rai and another v. Bijai Govind*, 2 M. I. A., 181. So also for *duress* and *intimidation*.

(4) In an ejection suit, if the suit is objected to on the ground that it is barred by the statute of limitation, it is on the plaintiff to prove that it has not been barred It is not for the defendant to show that the suit has been so barred. *Kunwar Nitrasor Singh v. Nand Lal*, 8 M. I. A, 199.

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* A manager of property belonging to an Idol.

(5) Where a plaintiff sues for a declaratory decree confirming his title he must establish not only *possession* but his *right* to the property in question. He will not obtain a decree simply because the title of the defendants is weaker than his. *Joloke Singh v. Gurwar Singh*, 2 W. R, Civ. Rul, 167.

3. The *burthen of proof* will very often shift from one side to the other in the course of a suit.

Burden of proof as to particular fact

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

(*a*) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C A must prove the admission

B wishes the Court to believe that, at the time in question, he was elsewhere He must prove it.

Note

1. Cases in which the law has thrown the burden of proof on particular persons :—

(1) Sections 105—111 of this Act. (2) Section 9 of the Criminal Tribes' Act, 1871. (3) Section 44 of the Code of Criminal Procedure, 1882. (4) Section 19 of the Indian Succession Act

2 The cases quoted under the above section illustrate this section also.

Burden of proving fact to be proved to make evidence admissible

104. The *burden of proving any fact* necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*) A wishes to prove a dying declaration by B A must prove B's death.

(*b*) A *wishes to prove, by secondary evidence, the contents of a* lost document

A must prove that the document has been lost.

Note.

In connection with this section read s 136 of this Act

Burden of proving that case of accused comes within exceptions

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any

special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Indian Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments

A is charged with voluntarily causing grievous hurt under Section 325.

The burden of proving the circumstances bringing the case under Section 335 lies on A.

Note.

1. The old Code of Criminal Procedure required that the prosecution should establish the absence of *special* exceptions mentioned in any section of the Indian Penal Code under which the accused is charged. As to *general* exceptions the rule was the same as in this Act Now that Code has been repealed, and the prosecution need not prove the absence of *special* as well as *general* exceptions.

2 In an action for loading a ship with inflammable material without notice the plaintiff must prove absence of notice

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Note.

1. In an action for penalties against the proprietor of a theatre for performing a drama without the permission of the author, the burden of proof of consent is on the proprietor of the theatre. *Morton v. Copeland*, 24 L J, C. P, 169.

2. In an action against an Apothecary for practising without a certificate, the Apothecary must prove that he has a certificate *The Apothecaries' Company v. Bentley*, R. & M, 159.

3 If a document which a person produces in support of his claim contains alterations, it is that person's duty to prove that the alterations were made previous to the execution of the deed or to give other satisfactory explanation of the alteration. As to the effect of alteration in a document see note to s 64

Burden of proving death of person known to have been alive within thirty years

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Note

The Hindu Law presumed the death of a person who had not been heard of for 12 years; and the Muhammedan Law presumed the death of a missing person 90 years after his birth

Burden of proving that person is alive who has not been heard of for seven years

108. [Provided that*] when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it

Note

Although there is a presumption in favour of the death of a person who has been missing for seven years, yet there is no presumption as to the exact time of his death A party asserting that the missing person died at a particular point of time must prove what he asserts

Burden of proof as to partnership, tenancy, and agency

109 When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Note.

1. *Reason for the rule*.—The presumption contained in this section is based upon the supposition of the continuance of human affairs

2. *Partnership and Agency*.—As to the mode in which a partnership may be terminated, see s. 264 of the Ind Cont Act; and as to the mode of the dissolution of the relation of principal and agent, see s. 203 of the Ind Cont Act

3 *Lease*.—This presumption in favour of the continuance of the relationship of landlord and tenant is not made, when the lease is for a fixed term and the term has expired *Tilak Patah v. Mahabir Panday and another*, 7 B L R, Ap 11.

* Added by Act XVIII of 1872, Section 9

Burden of proof as to ownership

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Note.

1 *Possession* —Mere violent seizure and occupation of a wrong doer is not a possession within the meaning of this section. When such is the case the person *dispossessed can sue for possession without showing his title. (See s. 9 of the* Specific Relief Act of 1877) But '*possession*' does not mean the *personal occupation* of the person; it may be occupation by means of a *servant* or *agent*.

2 *Ejection Suits* —In *ejection suits* the plaintiff cannot succeed merely by showing possession but he must prove his title. He can succeed by showing possession only in *possessory suits* under s 9 of the Specific Relief Act *Ertaza Hosein* v *Bani Mirtu*, I L R 9 Cal, 130, *Mahomed Ali Khan* v *Khaja Abdul Ghunny*, I L R 9 Cal, 744.

Proof of good faith in transactions where one party is in relation of active confidence

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations

(*a*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney

(*b*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son The burden of proving the good faith of the transaction is on the father.

Note.

1. *Persons in position of active confidence* —A guardian standing in the relation of parent, a religious, medical or legal adviser, agents, trustees, executors, [illegible] It is not necessary that these relationships [illegible]

[illegible] ...ed to have been ... the position of ... action. This is ... urts of Equity.

Another similar practice of those courts which does not expressly find a place in this Act, but which will probably be brought under the general provisions of s 114, is that the person who benefits by a gift should show the good faith of the transaction

112 The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Birth during marriage, conclusive proof of legitimacy.

Note

1. The Legal Maxim is, '*Pater est quem nuptiæ demonstrant* *'

2 '*Had no access*' means '*had no means of sexual intercourse*' Therefore impotency of the husband may be proved to show the illegitimacy of the child

3 When access is proved, no evidence will be allowed to be given of the mother's profligacy to raise a probability of the illegitimacy of the child *Banbury Peerage Case*, 1 S and S , 153

child will be established

5 Questions to parents as to whether they had or had not connection will be probably disallowed on the ground of decency See s 151

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Proof of cession of territory

Note.

In *Damodhar Ghordan* v *Ganesh Devram*, 10 B H. C. Rep , 37, held that this section was bad in law inasmuch as the Crown had no power of ceding territory without the consent of Parliament.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Court may presume existence of certain facts

* He is the father whom the nuptials indicate.

Illustrations

The Court may presume—

(*a*) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession,

(*b*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars,

(*c*) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration,

[illegible]

(*e*) That judicial and official acts have been regularly performed;

(*f*) That the common course of business has been followed in particular cases,

(*g*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(*h*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him,

(*i*) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it —

As to illustration (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

As to illustration (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

As to illustration (*b*)—A crime is committed by several persons. A, B and C, three of the criminals are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

As to illustration (*c*)—A, the drawer of a bill of exchange, was a man of business B, the acceptor, was a young and ignorant person, completely under A's influence

As to illustration (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

As to illustration (*e*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances:

As to illustration (*f*)—The question is whether a letter was received It is shown to have been posted, but the usual course of the post was interrupted by disturbances.

As to illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

As to illustration (*h*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked:

As to illustration (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Note

An attempt has been made by continental writers and also by the English to reduce presumptions to a set of artificial rules, and to leave nothing to the Judge. It is of course necessary to have artificial definite rules on certain points, *e g.*, absence
ch cases the
79—90. As
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is inferences
drawn from
ircumstances

the legislature are:—

(1) Those regarding the intentions of a testator contained in section 88 of the Indian Succession Act.

(2) The presumption that a breach of contract for the transfer of immoveable property cannot be adequately compensated for by damages in money, and that a

breach of contract to transfer moveable property can be so compensated. Section 12 of the Specific Relief Act I of 1877

Some presumptions which still exist as judicial decisions are spoken of below.

3 *Presumptions of Hindu Law.*—

(1) All the property of an undivided Hindu family is joint and it lies on the person claiming any part as self-acquired to prove it to be such *Dharm Dass Pandey v. Mussamut Shama Sundari Debi*, 3 M. I A., Ap 229. It is doubtful if mere living in

raises such a presumption. Against this must be placed a contrary decision in a large number of other cases (*Danukdari Lal v. Ganpat Lal*, 11 B. L R., 201; *Shiv Golam Singh v Baran Singh*; *Radhika Persad Dey v. Mussamut Dharma Dassi Debi*, 3 B. L. R., A. C, 121, *Khelat Chandar Ghose v Khunj Lal Dhur*, 10 W R, C. R, 333) It is probable that in the absence of proof of the existence of joint funds from which the acquisition might have been made the court will refuse to consider it as joint property.

This presumption that all the property held by the members of an undivided Hindu family is joint may be rebutted by proof of several members having acquired separate property. The presumption in favour of joint family will not be rebutted by proof of one member having separated

(2) There is a presumption that a debt contracted by the manager of a Hindu family was for a family purpose.

(3) A childless Hindu will be presumed to have authorized his widow to adopt. *Collector of Madura v Muttu Ramalinga Setupati*, 12 M I A, 397.

(4) Where a Hindu family has migrated from one part of India to another the presumption is that it continues to be governed by the law of its origin.

4 *Presumptions of Muhammedan Law*—A Muhammedan dower is presumed to be demandable at any time and not merely on divorce.

5. *Presumption of the Law of Guardianship.*—Child's religion is supposed to be the same as that of the father

6 *Presumption as to Benami purchases*—The purchase of land by the father in the name of the son is presumed to be *benami* and to be for the benefit of the father. The presumption in English Law, that it was intended as a provision for the benefit of the son, does not find a place in India

When, however, a creditor of the apparent owner claims the property in satisfaction of his debts strict proof that the apparent owner is only benamidar must be given by the person asserting it.

A suit instituted by a benamidar is presumed to have been instituted with the consent of the real owner.

7. *Marriage and legitimacy.*—These may be inferred from the conduct of the

child.

The fact that a marriage took place between two parties on a certain date raises a presumption that the parties were not married previously.

Where a marriage would be invalid if a certain requisite had not been fulfilled, and the evidence shows that the marriage took place, there is a presumption that the requisite required to make the marriage valid was fulfilled *Piers v. Piers*, 1 H. L. C, 331.

8. *Presumptions as to wills and other documents.*—A will that has been long acquiesced in is presumed to be genuine *Rajendro Nath Holdar v. Jogendro Nath Banerjee*, 14 M. I. A, 67.

Alterations in a document in pencil are presumed to be deliberative, and alterations in ink to be real and conclusive.

Sanity is presumed; but when insanity is proved, proof of a lucid interval is on the person who asserts it.

The strength of the presumption, that the person in whose possession stolen articles are found is either the thief or a person who received it knowing it to be stolen, depends upon the nature of the article, and the length of time after which it is found in the possession of the accused. If the article is not one likely to change hands easily, and the article is traced to the possession of the accused shortly after the theft, the presumption is strong; if the reverse, the presumption is weak. By *possession* is meant *conscious* possession not merely the finding of the article in the accused's house which has probably been thrown there without the knowledge of the accused.

in law.

10. *Presumptions as to negotiable instruments*—A purchaser for valuable consideration will be presumed to have bought without notice of the circumstances invalidating the bill. There is a presumption that they were made for valuable consideration

11 *Presumptions as to land.*—The hereditary nature of a taluk may be presumed from long and uninterrupted enjoyment and the descent of the tenure from father to son. *Gopal Lal Takur* v *Teluq Chundar Rai*, 10 M. I. A, 191.

If a tenant holds over after the expiry of the lease, the presumption is that he holds subject to all the conditions of the former lease applicable to the new holding. *Nokar Das Mukh.* v. *Jeoraj Babu*, 12 B. L. R, 263. When payment of the rent

R., 246

If land is incapable of being held in possession, the person who is the owner is presumed to have been in possession; and if land, which was originally in the possession of a man, becomes incapable of being possessed, as when it is flooded, there is a presumption that his possession continues

12 *Presumption as to the discharge of official duties*—A man acting in a public capacity was properly appointed and authorised to do so; judges and jurors do

have

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CHAPTER VIII.—Estoppel

Estoppel.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Note.

1 *Definition of Estoppel*—*Estoppel* is the disability which a man labours under and by which he is estopped or prevented from proving the untruth of his previous representations by deed or word as against the person who has changed his position in consequence of such representations

2. *Divisions of estoppel*—English Lawyers divide *estoppels* into three classes —*Estoppel by matter of record, estoppel by deed* and *estoppel by matter in pais.**

(1) *Estoppel by matter of record*—By *matter of record* is meant the *judgment of a Court.* We have already seen how judgments of Courts of Justice preclude persons from proving or disproving certain facts. (See ss 40 and 41.)

(2) *Estoppel by deed*—By *deed* is meant a *contract under seal.* In English law if a person enters into a *contract under seal,* he is not allowed to dispute the contents of a document *Contracts under seal* are not recognised in India except in the Presidency Towns; and even there only as between Europeans We may therefore leave out of consideration this class of estoppels also.

(3) *Estoppel by matter in pais*—This is the kind of *estoppel* especially referred to in this chapter

The principle was thus stated by *Lord Denman* in *Pickard* v. *Sears*, 6 Adolphus and Ellis's Reports, 475:—"The rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time"

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* *In pais* means "*in the country*" or "*before the public*" Instances of *matter in pais* are livery (giving of possession), entry, acceptance of rent, partition, acceptance of estate, &c.—LORD COKE.

† As to the effect of substituting, in the Ind. Ev. Act, "intentionally" for "wilfully," see the observations in *Eranjoli Illath Vishnu Nambudri* v. *Eranjoli Illath Krishnan Nambudri*, I. L. R., 7 Mad., 8.

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cast [illegible] often

"If a man," writes *Mr Justice Story*, "having a title, to an estate, which is [illegible]

[illegible] it"

In *Carr v London and North-Western Railway Company*, L. R., 10 C P., 307, *four recognised propositions* of an *estoppel in pais* were enunciated by the Court —

I. "If a man by his words or conduct *wilfully endeavours* to cause another to believe in a certain state of things which the first *knows to be false* and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist

II. If a man, either in express terms or by conduct, *makes a representation* to another of the existence of a certain state of facts *which he intends to be acted upon in a certain way* and it be acted upon in that way, in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

III. [illegible]

IV. [illegible] rked *ause* *the* It the re a person by his negligence allows his goods to be stolen, he is not estopped from denying the title of an innocent purchaser of the goods from the thief.

The above propositions regarding *estoppel in pais* lead to a three-fold division of *estoppel in pais*, viz, *by statement, by conduct and by negligence*. The definition of estoppel in this section, "when one person has, by his *declaration, act or omission* intentionally caused, &c." follows this classification of *estoppel in pais*.

3 *Essentials of estoppel* —(1) There must have been *declaration, conduct* o *omission* which amounts to an intentional causing or permitting belief of a certain fact in another (2) That other must believe. (3) That other must have acted upon such belief.

CHAPTER VIII.—Estoppel.

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II.

III. If a man, whatever his real meaning may be, *so conducts himself that a reasonable man would take his conduct to mean a certain representation* of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

IV.

In *Swan v N. B Australian Company*, 2 H. & C, 175 *Blackburn*, J, remarked that the neglect must be (1) *in the transaction itself*, (2) *the proximate cause of leading the party into mistake*, and (3) *the neglect of some duty which the*

denying the title of an innocent purchaser of the goods from the thief.

The above propositions regarding *estoppel in pais* lead to a three-fold

3 *Essentials of estoppel* —(1) There must have been *declaration*, conduct or omission which amounts to an intentional causing or permitting belief of a certain fact in another. (2) That other must believe (3) That other must have acted upon such belief.

It is not necessary that the person causing or permitting belief must have known the untruth of the fact believed by the other, it is sufficient that the belief was intentionally caused *Jordon v Money*, 5 H L C, 185

The misrepresentation must be a misrepresentation of *fact*, and not of mere *intention* *Jordan v Money*, 5 H L C, 185

A person cannot use as an estoppel a statement by which he has been in no way misled or induced to alter his position to his detriment. A Hindu father adopted a son and then adopted another son during the life of the first. The father

een his two adopted sons, the first
the death of the father, it was held
ed by his acquiescence from question-
property, he was not in any way
to ancestral property. *Rangama v*

4 *Estoppel by Declaration* — A person wilfully made a false statement regarding the price of certain horses
them at a lower rate of charges.
negligence of the Company The
recover their price that they wer
North-Western Railway Co, 7 H & N, 447

5 *Estoppel by Conduct* —Estoppels of this kind are by far the most numerous Where the real owner of immoveable property allows another person (a *benamidar*) to be in possession of title-deeds and hold himself out to the world as the real owner and so induce ignorant persons to lend money on its security or purchase it, the real owner or persons claiming through him would be estopped from disputing the title of the innocent person. *Rennie v Ganga Narain Chaudri*, 3 W R, Civ Rul, 10; *Brojanath Ghose v Kailas Chandra Banerji*, 9 W. R., Civ. Rul, 593, *Ram Kumar Kundu v John and Maria McQueen*, 11 B L. R, 53.

So also where owner of goods allows them to remain in another's possession and allows that other to obtain credit on their security. *Bani Persad and others v. Maun Sing*, 8 W R, Civ Rul, 67.

rtgages of their property with the
y will not afterwards be allowed to
for the purpose of recovering the
mani Dasi and others, 3 W. R, Civ
Rul, 92 But if the person in whose favour the fictitious sale or mortgage was concluded brought a suit to assert his title, he will not succeed; for then the maxim, "*In pari delicto potior est conditio possidentis**" applies

estopped from setting up want of jurisdiction against this order. *Govind Vaman v Sakharam Ramachandra*, I L R 3 Bom, 12

*Among guilty parties, the party who is in possession is more powerful, *i. e.*, will succeed.

Where a party sets up a particular case, he will not generally be allowed to shift his case during the course of the suit This is usually called *estoppel by pleadings*

6 *Estoppel by Omission* —The essentials required to raise an estoppel of this kind in addition to the ordinary ones are those mentioned under para 2 of the notes to this section in connection with *Swan* v *N B Australian Company*, 2 H and C 175

Where a negotiable instrument was so carelessly drawn as to facilitate the change of "£50" into "£350," the maker was estopped from proving against a purchaser for valuable consideration without notice that it was not originally so drawn *Young* v. *Grote*, 4 Bing 254

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

Estoppel of tenant

Note.

[illegible]

this Act is similar

A tenant may however show that the landlord mentioned in the lease-deed is only a benamidar and that therefore he need not acknowledge his title. *Donzell* v. [illegible] is true that this case was decided [illegible] decision under the Act will not be [illegible] in the case of benami holdings. [illegible] parol evidence of the fact that the [illegible] at it is a variation of the written contract. *Trueman* v. *Loder*, 11 Adolphus and Ellis Rep, 595.

[illegible]

2 The tenant cannot deny that the landlord had no title at the beginning of the tenancy; but he may show that, at some time previous, the landlord had no title, or that he lost it at some subsequent time.

3 The estoppel continues in English Law during the time that the possession continues; in the Act it continues for a longer time, *namely*, during the continuance of the tenancy. The *estoppel* would not cease even after 12 years possession without paying rent, if it is shown that the possession was obtained in the capacity of tenant

[illegible]

Estoppel of acceptor of bill of exchange, bailee or licensee.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

Note

1 The acceptor of a bill of exchange is not however estopped from denying the genuineness of the signature of the payee or of an indorsee although it might have been on the bill at the time of the acceptance. He is estopped from denying the signature of the drawer, his authority to draw and, if the bill be payable to himself, his authority to endorse although the bill might have been drawn after acceptance.

According to English Law the acceptor does not admit the drawee's authority to endorse it

See Chap XIII of the Negotiable Instruments Act, 1881, as to certain special rules of Evidence relating to *negotiable instruments*.

2 In English Law the bailee may prove that another person had a better title than the bailor only when (1) the goods were obtained by the bailor by *fraud* or *tort* and the bailee did not know it at the time of the bailment, (2) the bailor is a *common carrier*, and (3) the bailment is a *pledge*; under this section, the bailee may set up the better title of a third person in all cases

As to '*bailments*' see Chapter IX, Indian Contract Act

CHAPTER IX.—Of Witnesses.

Who may testify.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Note

1. This section renders every person competent provided he is able to understand the questions put to him and to give rational answers to the same The English Law requires also that he must know that he ought to speak the truth; this is not required by this Act In *R* v *Mussumut Itwarya*, 14 B L. R , 54, the simple affirmation of a child of such tender years that it did not know the nature of an oath or solemn affirmation was admitted in evidence.

The amount of credence to be given to each witness is at the discretion of the judge or the jury, and this would depend upon the witness's *demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory* and *other tests* by which the value of their statements can be ascertained with tolerable accuracy

See the provisions of Act X of 1873 as to the mode of giving evidence

2 *Saving* —This section must however be taken subject to the special provisions to be found elsewhere in the Act disabling persons from giving evidence of certain facts An accused person cannot give evidence in his own trial. (See s 345 of the Cr. Pro Code of 1882)

Nor can an accused person give evidence against a co-accused unless the former has obtained a pardon under the Code of Crim. Pro *The Queen* v. *Ashraf Sheik and others*, C W R , Cr. Rul , 91. When a charge was made against two persons, but process issued against only one, the other was held to be a competent witness *Mohesh Chandra Kopali* v *Mohesh Chandradas*, 10 C. L R , 553.

3 The attendance of witnessess, their speaking the truth, producing documents are compelled by Civ. Pro Code, Chap XIV, Crim Pro Code, Chap XVIII, Indian Penal Code, ss 172—177 and 179—180, and s 26 of Act XIX of 1853 (See Appendix)

Dumb witnesses.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Note.

Deaf and dumb persons were formerly excluded on the presumption of their idiocy. This belief has been discovered to be groundless

Married persons in Civil and Criminal proceedings.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Note

1. Persons may be divided into four classes with reference to their capacity to bear witness.—(1) Those that are *incompetent to bear witness under all circumstances*, such as, madmen, (2) Those that are *incompetent to bear witness to certain facts except with the consent of certain persons* (see ss 122, 123, 126 and 127,) (3) Those that are *competent to bear witness to certain facts but cannot be compelled* (see ss 121, 122, 124, 125 and 129) (4) Those that are *competent and compellable.*

the Act the rule is different In civil cases the Indian Law falls short of the English Law In English Law, in all matrimonial suits, the husband or wife of a

De Bretton and Holme, I L. R, 4 All, 49

3 As to witnesses who are competent to prove wills see s. 55 of the Indian Succession Act

4. The provisions of this section are subject to those of section 122.

Judges and Magistrates.

121. No Judge or Magistrate shall, except upon the Special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(*a*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a Superior Court

(*b*) A is accused before the Court of Session of having given false evidence before B, a Magistrate B cannot be asked what A said, except upon the special order of the Superior Court.

(*c*) A is accused before the Court of Session of attempting to murder a Police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Note.

1. Note that the privilege of the Judge or Magistrate extends only "*to his own conduct in court as such Judge or Magistrate or to anything which came to his knowledge in court as such Judge or Magistrate.*" This is a privilege which the Judge or Magistrate in question may waive. *Empress* v. *Chidda Khan*, I. L. R, 3 All, 573.

2 In England *arbitrators* and *barristers* seem to have a like privilege. It does not exist in India

3 Can a Judge be a witness in a case which he is himself trying?—This question has not yet been definitely settled No Judge ought to import into his

... with the aid of assessors This was adversely commented upon by *Markby*, J. in *I* v. *Donelly*, 2 I L. R Cal, 405 There it was held that a sole Judge of law and fact ought not to be allowed to give

evidence in a case which he is trying. It was pointed out in that case that where there is only one Judge the case is entirely in his hands, that he has no one to restrain or check him, and that the party against whom the evidence is given cannot

nd to contradict

usual safeguards

repudiated

1 As to jurymen or assessors who have a personal knowledge of the facts of the case, see s 294 of the Cri. Pro Code, 1882.

122. No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Communications during marriage.

Note.

1. The protection afforded by the section applies to all communications made during marriage and not only to confidential communications; and it subsists even though the marriage has been since dissolved,—the wording of the section is "has been married"

But it does not extend to communications made before marriage.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withold such permission as he thinks fit.

Evidence as to affairs of State.

Note.

Affairs of State would mean any matter of a public nature in which the Government is interested.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Official communications.

Note.

1. Statements made by an officer before a military court of enquiry embodied in a report to the Commander-in-Chief are communications in official confidence Disclosure cannot be compelled in such a case.

2. Where according to this and the foregoing section, there is no liberty to

125 No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence; [*and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the Public Revenue.

Information as to commission of offences

Explanation.—'Revenue officer' in this section means any officer employed in or about the business of any branch of the public revenue.]

Note.

1.—The privilege may be waived

2.—The portion within rectangular brackets has been added by Amending Act XVII of 1886 *The Statement of Objects and Reasons runs as follows :*—

The object of this Bill is to prevent officers of any department concerned with any branch of the public revenue from being compelled to say whence they got any information as to the commission of any offence.

In England not only is it the case that witnesses may not be compelled to disclose, but they are not even permitted to be asked, the names of those from whom they receive information as to frauds on the revenue (*Russell on Crimes and Misdemeanours*, Fifth Edition, III 553). The law on the subject is further stated in Bell's *Laws of Excise* as follows —

"It is a rule of evidence applicable to criminal cases, and the same rule has always been held [illegible]

W. 169)"

[illegible]

126. No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Professional communications

Provided that nothing in this section shall protect from disclosure—

* Added by Act XVII of 1886

(1) Any such communication made in furtherance of any [* illegal] purpose;

(2) Any fact observed by any barrister, pleader, attorney or vakil in the course of his employment as such; showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [† pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations

(a) A, a client, says to B, an attorney,—'I have committed forgery, and I wish you to defend me'

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney,—'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, [illegible] B observes that an [illegible] with the sum said [illegible] e book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Note.

1. *Reason of the rule.*—Lord Chancellor Brougham remarked in *Greenough v. Gaskell*, Mylne and Keene's Chancery Rep, 103:—"The foundation of this rule is not on account of any particular importance which the law attributes to the business of legal professors or any particular disposition to afford *them* protection. But it is out of regard to the interest of justice, which cannot be upholden, and [illegible] aid of men sl[illegible] matters affect[illegible] proceedings" [illegible] Rep, 94, the [illegible]

* Substituted by Section 10, Act XVIII of 1872.

† Added by Section 10, Act XVIII of 1872

tected no man would dare to consult a professional adviser with a view to his defence, or to the enforcement of his rights, and no man could safely come into a court either to obtain redress or to defend himself.

2 *Who are within the rule.*—This section applies to *barristers, attorneys, pleaders and vakils.* Sec. 127 extends the operation of this rule to *interpreters, clerks* or *servants* of barristers, pleaders, attorneys or vakils. Under s. 24 of Act II of 1855 whose wording is similar to that of this section, it has been held that this rule does not apply to *muktars* *The Queen v. Chandra Kant Chakravarti*, 1 B. L R, A Crim, 8 In England the rule applies in the case of all persons who are necessary for communication between the client and the legal adviser. Even in England an attorney consulted in the character of a friend and not in his professional capacity, a medical man, a clergyman, a banker, steward, a confidential friend, &c, are outside this rule. It appears doubtful if a Roman Catholic priest would be at liberty to disclose the secrets of the confession—most probably not It seems that when a person is consulted under the erroneous belief that he was an attorney, the person will be prevented from disclosing the communication.

When two parties employ a common solicitor, communications made by one to him in the character of his solicitor are privileged and cannot be disclosed.

3. *What communications within the rule* —They must have been professional, i e, they must have been made *in the course of* and *for the purpose of* the barrister's or other person's professional employment. If communications are made to a lawyer and he is not afterwards employed, the rule does not apply. It is not necessary that the communications must have reference to a matter on hand Matters which can be observed by anybody, such as knowledge of handwriting, are not within the rule.

Communications between the client and the legal adviser only are within the rule. The legal adviser may give, and may be compelled to give, evidence of his communications to the opposite party, although in obedience to the instructions of his client

4 *The duration of the privilege.*—The obligation not to give evidence continues even after the employment has ceased. [illegible]

5 Is the legal adviser prevented from producing documents which he has obtained from the client in the course of and for the purpose of his employment? Although there is no distinct provision to that effect, yet it seems he is prevented.

6 No adverse inference can be drawn from a party not permitting his legal adviser to give evidence of professional communications.

7. Read s. 23 of this Act in connection with this section.

127. The provisions of section one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

Section 126 to apply to interpreters, &c.

Note.

The extension of the rule to *interpreters* is specially necessary in a country like India.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-

Privilege not waived by volunteering evidence.

six; and if any party to a suit or proceeding calls any such barrister, [* pleader,] attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, pleader, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Note

By the old law, Act II of 1855, s 21, if a party gave evidence in a suit at his own instance, he was deemed to have consented to his legal adviser giving evidence of professional communications made to him But under the Act he does not do so. Nor does he do so by calling his own legal adviser as witness, unless he examines him on the nature of the privileged communications Read s 129 with this section

Confidential communication with legal advisers.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Note.

1 *Nature of the Section.*—This section relates to the subject of *discovery* and is a limitation upon the general provisions of the Civ. Proc. Code, ss 121—130 on *Interrogatories* and *Discovery*. Section 23 of this Act is also a like limitation.

2. *Discovery.*—*Discovery* of documents in the possession of the opposite party [illegible] ty. It can now [illegible] the Judges are [illegible] from the oppo- [illegible] material to the plaintiff's case and which the defendant has not admitted (2) The party's right to put the opposite party to his oath is limited to a discovery of *such material facts as relate to his case*, and does not extend to a discovery of the manner in which the *opposite party's* case is to be exclusively established or to the evidence which relates exclusively to such case

3 [illegible]

[illegible]

4 The rule under the old law, Act II of 1855, s 22, was that the party lost the privilege by offering himself as witness The rule under this Act is different.

*Added by Section 10, Act XVIII of 1872

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document, the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of witness' title-deeds.

Note

1 [illegible] A witness [illegible] ould expose [illegible] England and [illegible] ground that [illegible]

2 The words, "Who is not a party to the suit," are important.

3 Where the non-production is privileged, the witness cannot be compelled to answer questions regarding its contents. This is the rule at least in English Law.

4 The witness who objects to produce on any of the grounds mentioned must nevertheless bring the document to Court, and the Court is to decide on the validity of the objection. See s. 162 Civ. Proc Code.

5 *Attorney's Lien.*—See ss 171 and 221 of the Indian Cont. Act as to the attorney's lien. An attorney who has such a lien may refuse production when required to produce by the person against whom he has the lien.

Production of documents which another person, having possession, would be entitled to refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person *consents to their production.*

Note.

When a person justly refuses under this or the preceding section to produce a document, he is not legally bound to produce it, and secondary evidence of its contents cannot be given. See s. 65, clause (*a*).

Witness not excused from answering on ground that answer will criminate.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind;

Proviso.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any

criminal proceeding, except a prosecution for giving false evidence by such answer.

Note.

1. *English Law* —The rule of English Law on the point is different; a witness is excused from replying to any question, the answer to which would have a tendency to expose such witness or the husband or wife of such witness to any kind of criminal charge or to any kind of penalty whatsoever. In America the protection is restricted to those questions the answers to which would have a tendency to subject the witness to the punishment of felony. In India the witness can claim no such protection.

2 "*As to any matter relevant to the matter in issue*"—These words are important When the question is *relevant to the matter in issue* the Judge has no option to let the witness answer or not. But where the question is put in cross examination and is relevant only in so far as it affects the credibility of the witness, the Judge has an option either to compel an answer or allow the witness to leave the question unanswered See s 118, *post.*

[illegible]

4. There is an exception to this section. Witnesses examined by Police officers are not bound to answer criminating questions put by such officers See sections 161 and 175, Crim Pro. Code of 1882.

5 *Penalties for refusing to give evidence and for perjury* —See Indian Penal Code ss 179 and 193, Crim. Proc. Code, Schedule V, XXVIII (11) 4, Act XIX of 1853* s. 26, Civ Pro. Code, ss. 169 and 175.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Accomplice.

Note.

1. *The practice of criminal courts.*—Although it is legal to convict on the uncorroborated testimony of an accused person, it is almost the uniform practice not to do so; for the accomplice comes into Court with a confessedly bad character and has a distinct motive not to speak the truth But at the same time it is not advisable to lay down the rule that the testimony of an accomplice is legally insufficient for conviction.

2. *Rules as to the mode of dealing with such evidence when there is a jury.*—The Law on this point was fully discussed by a Full Bench of the Calcutta High Court in *Queen v. Elahi Baksh*, S. C., 5 W. R., Crim. Rul, 80; and the following rules were laid down :—

(1) A conviction upon the uncorroborated evidence of one accomplice or more than one is valid in law.

[illegible]

See also *The Queen v. Sadhu Mandial*, 21 W. R , Crim. Rul , 69.

3. *On what points should there be corroboration* —The accomplice's evidence should be corroborated as to the identity of the accused, *Reg v. Budhu Nanku*,

* See Appendix.

I L R 1 Bom, 475. The evidence must also be corroborated as to the *corpus delicti* (the fact of the commission of the offence) *R. v. Chatur Puroshotam*, I. L R. 1 Bom., 476.

4 *What testimony constitutes corroboration* —Neither the previous statements of the accomplice himself nor the confessions of a co-accused can be taken as sufficient corroboration of the accomplice's evidence.

5 As to tender of pardon to an accomplice, see Crim Proc. Code, ss 337—339.

Number of witnesses.

134. No particular number of witnesses shall, in any case, be required for the proof of any fact.

Note.

[illegible]

2. *Treason.*—In English Law and under the old law in India, Act II of 1855, [illegible]

aiming at the *person* of the sovereign.

3. *Perjury* —The old English Law required the oath of not less than two [illegible]

that of England in this point in another respect also In England, the accused cannot be convicted on an alternative finding that one of two contradictory statements made under oath by the accused must have been known by him to be false. See *Taylor* and *R v Jackson*, 1 Lew C C, 270. In India a person may be convicted of [illegible]

Crim, 9.

4. *Bastardy and Breach of Promise cases* —In English Law, in the former case the mother's statement requires corroboration, and in the latter the plaintiff's evidence must be corroborated.

5. A court is bound to examine all the witnesses adduced by the parties *Jeswant Sing-ji Ubbi Sing-ji, &c. v. Jet Sing-ji Ubbi Sing-ji*, 2 M. I. A., 421. But in *Ram Dhan Mandal and another v. Rajballab Paramanik*, 6 B L R., Ap. 10, it was said, "It has been repeatedly ruled that *unless the object of a party in sum-* [illegible]

CHAPTER X.—*Of the Examination of Witnesses.*

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Civil and Criminal Procedure respectively, and, in the absence of any such law, by the discretion of the Court.

Order of production and examination of witnesses.

Note.

[illegible]

Penal Code lay down certain penalties for failing to attend or to produce a document after a summons to do so See also the provisions of s. 26 of Act XIX of 1853 for damages arising from a witness not attending and giving evidence.

Sections 640 and 641 of the Civ. Pro Code, provide for the exemption of certain persons from attendance in a court, and s. 642 of the Civ. Proc. Code, as to the protection of witnesses from arrest.

2. *Examination of witnesses in Civil cases.*—The evidence of a witness must be taken orally in open Court in the presence and under the personal direction and [illegible] exceptions [illegible] Court [illegible] Code) [illegible] before the trial. (Section 192 of the same Code.)

The order of production and examination of witnesses are governed by ss. 179, 180 and 555 of the Civ. Proc. Code, see s. 191 of the same Code.

[illegible]

See also ss 287—292, 340, 342, 349, 350, 434, 439, 440 of the same Code.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

Judge to decide as to admissibility of evidence

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may in his discretion either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section thirty-two

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(*b*) It is proposed to prove by a copy the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(*c*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Cout may in its discretion either require the property to be indentified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is indentified.

(*d*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C, and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C, or D is proved, or may require proof of B, C, and D before permitting proof of A.

Examination in-chief.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Order of examinations Direction of re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the *facts to which the witness testified on his examination-in-chief.*

The re-examination shall be directed to the explanation of matters referred to in cross-examination, and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Note

1 The provision that the cross-examination must be confined to relevant facts must be taken along with the provisions of ss 146 and 154—156.

2 As to the uses of cross examination the following extracts should be read

opportunity of observing his demeanour and of determining the just value of his *testimony. It is not easy for a witness subjected to this test to impose on a Court* or jury, for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross examination may be extended."

Alison's *Practice of the Criminal Law of Scotland*, 546, 547 :—"Where a witness is

carefully put forth; and it frequently happens that in this way the most important testimony in a case is extracted from an unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal."

3. *The uses of re-examination.*—Explanation of terms used by the witness under cross-examination, his motives in using those terms, to reconcile apparent inconsistencies in his answers under cross-examination, &c.

Cross-examination of person called to produce a document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Note

By section 161 of the Civ Proc Code, a witness summoned merely to produce a document may cause the document to be produced without himself attending.

Witnesses to character

140. Witnesses to character may be cross-examined and re-examined.

Leading question

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

When they must not be asked

142 Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

Note

The Court may under s 154 allow leading questions to be put in the examination-in-chief

When they may be asked

143 Leading questions may be asked in cross-examination.

Note.

The liberty given by this section must not be abused It does not mean that the party can put into a witness' mouth the very words which he wishes to get back

Evidence as to matters in writing

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is, whether A assaulted B

C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter

Note

Is it the duty of the Court to object to secondary evidence until facts have been proved entitling the party to give secondary evidence? Or is it the duty of the opposite party alone? Under the Crim Proc. Code, the Court is bound to object See s 236 of the Code In the Civ Proc Code there is no such provision But even here the Court appears to have a like duty Consider the language of ss 59, 64, 65, 66 and 165 of this Act.

Cross-examination as to previous statements in writing

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved, but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Note

1 This is a limitation on the previous section; because although the matter may have been reduced to the form of a document, questions in cross-examination regarding it are allowed if the matter were relevant to the matters in question.

2 The rule in this section is exactly the same as s 24 of the Common Law Procedure Act, 1854 (17 and 18 Vic, cap, 128) But the English rule applies in theory at least only to civil cases; while the rule in this section applies both to civil and criminal cases

The old English rule excluded such questions unless the document was already in evidence. This rule excluded one of the best tests by which the memory and integrity of a witness could be tested.

3 The Act is silent as to the question whether, when the document has been lost or destroyed, a copy can be used instead of the original.

4 The rule would in its entirety probably apply to previous verbal statements also

Questions lawful in cross-examination

146. When a witness is cross-examined, he may, *in addition to the questions herein-before* referred to, be asked any questions which tend

(1) to test his veracity;

(2) to discover who he is, and what is his position in life; or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Note.

1. "*In addition to the questions herein before referred to*" must be read along with s. 138

2 In India a party may with the permission of the Court discredit his own witness on general grounds

When witness to be compelled to answer

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section one hundred and thirty-two shall apply thereto

Court to decide when question shall be asked and when witness compelled to answer

148 If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it; and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness' character and the importance of his evidence.

(4) The Court may, if it sees fit, draw, from the witness' refusal to answer, the inference that the answer if given would be unfavourable.

Note.

1. In England in cases of indecent assault or attempt at rape, the prosecutrix should not be asked whether she had previously connection with any other man. But questions as to her having previously had connection with the prisoner or as to her being a common prostitute may be asked. The same is the rule here.

2. As to the rule in clause (4), see s 114 (h)

3 Is a witness answering an irrelevant question under the compulsion of the Court protected under s 132? Strictly speaking not. But in reason he should be so protected

Question not to be asked without reasonable grounds.

149 No such question as is referred to in section one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(*a*) A barrister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(*b*) A pleader is informed by a person in Court that an important witness is a dacoit. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whetherhe is a dacoit.

(*c*) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(*d*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

Note.

The reasonable grounds referred to may be very slight.

Procedure of Court in case of question being asked without reasonable grounds

150. If the Court is of opinion that any such question was asked witout reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Note.

"The object of these sections is to lay down, in the most distinct manner, the duty of council of all grades in examining witnesses with a view to shaking [illegible] xplicit statement of the [illegible] t not to be asked, will [illegible] that which in England [illegible] he sections, as far as [illegible] they will be admitted [illegible] Mr. STEPHEN's Speech.

See the second proviso to section 165, post

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Indecent and scandalous questions

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Questions intended to insult or annoy

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exclusion of evidence to contradict answers to questions testing veracity

Exception 1.—If a witness is asked whether he has been previously convicted of any crime, and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a*) A claim against an underwriter is resisted on the ground of fraud

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dimissed for dishonesty.

The evidence is not admissible.

(*c*) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence

(d) A is asked whether his family has not had a blood feud with the family of B, against whom he gives evidence.

He denies it He may be contradicted on the ground that the question tends to impeach his impartiality

Note.

1 The general rule is that a witness' answers to relevant questions may be contradicted while his answers to irrelevant questions *ought not* to be contradicted. The reason is that the trial would otherwise be unnecessarily prolonged.

2 Exception 1 is taken from the 25th section of the Common Law Procedure Act, 1854

3 Exception 2 is taken from the judgment of the Exchequer Court in *Attorney-General v Hitchcock*, 1 Ex, 91

4 Read illustrations (*n*) and (*o*) to s 141, and section 15.

Question by party to his own witness

154. The Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Note.

The Court will have to exercise this discretion when a witness unexpectedly turns out to be hostile to the party who calls him or is manifestly interested for the other party or is unwilling to give evidence or stands in a situation which naturally makes him adverse to the party who desires his testimony.

Impeaching credit of witness

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

(1) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) By proof that the witness has been bribed or has [accepted*] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

* Added by Section 11 of Act XVIII of 1872.

(4) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a*) A sues B for the price of goods sold and delivered to B.

C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(*b*) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

Note.

1. In England the right of a party to contradict a witness called by himself was long a disputed point, the right has been established by the Common Law Procedure Act, 1854.

2. The credit of a witness may be impeached in another way also, viz, by disproof of facts deposed to by the witness; see s. 5.

3. It is not necessary as in English Law to lay a foundation for impeaching the credit of the witness by first putting the very same questions to the witness.

4 The offer of a bribe to the witness is no proof of the untrustworthiness of the witness Acceptance of the bribe must be proved. *Attorney-General v. Hitchcock.*, 1 Ex., 91.

5. *Previous statements liable to contradiction.*—These are statements as to relevant facts or of the nature mentioned in the exceptions to s. 153

6 It is very often inadvisable to cross-examine an adverse witness as to the reasons of his pronouncing a favourable witness worthless.

Questions tending to corroborate evidence of relevant fact admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court

is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration

A, an accomplice, gives an account of a robbery in which he took part He describes various incidents unconnected with the robbery, which occurred on his way to and from the place where it was committed

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself

Note

This section makes admissible evidence which, without being exactly relevant in the sense that it tends to prove relevant facts, is still highly useful in corroborating a true witness and in exposing a false one

Former statements of witness may be proved to corroborate latter testimony as to same fact.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Note

1. The *English rule upon the subject is that although* contrary statements made by the witness on some former occasion without being under oath are admissible for the purpose of showing the untruthfulness of the witness, still, such *statements when consistent with the witness' evidence cannot be proved. Starkie on Evidence*, page 253

2 The statement to be admissible must have been made before any authority legally competent to investigate the fact or at or about the time when the fact took place.

What matters may be proved in connection with proved statement relevant under Section 32 or 33.

158. Whenever any statement, relevant under section thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

Refreshing memory.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon after-

wards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Note

1. *Refreshing memory by reference to documents*—In English Law it is objectionable to refer to a document prepared after a controversy had arisen. It is not however necessary that the document itself should be admissible.

2. The document must have been prepared at the time that the fact took place or so shortly after that the facts were fresh in his memory at the time he made the document

3. When reference is made to a document made by another, the witness who is allowed to refer must have inspected the document at a time when the facts were fresh in his memory and he must have found it correct.

4. [illegible] nite rule on the point. It [illegible] not proved to be a correct [illegible] of the facts narrated

Testimony to facts stated in document mentioned in Section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Note.

It is doubtful if the phrase "any such document as is referred to in s. 159" includes copies of documents also.

161 Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party, if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Right of adverse party as to writing used to refresh memory.

Note.

The English law allows the opposite party to cross-examine only on the points referred to Otherwise be must make the document his own evidence. No such restriction appears in the Act

162 A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

Production of documents

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and if the interpreter disobeys such direction, he shall be held to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

Translation of documents.

Note.

1. A document is said to be in the power of a person who could effect its production either personally or by means of another. But a public document is not so in the power of a clerk that he can even bring it to Court without the permission of the head of the office.

2. The Judge may inspect [illegible] of the [illegible] of s. 123.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence, if the party producing it requires him to do so.

Giving as evidence of document called for and produced on notice

Note

Giving as evidence of document, production of which was refused on notice

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues B on an agreement, and gives B notice to produce it At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents, B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

Note.

examination, or to produce and prove it as part of his own case."—TAYLOR, § 1615.

Judge's power to put questions or order production

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document, which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall

the Judge ask any question which it would be improper for any other person to ask under sections one hundred and forty-eight or one hundred and forty-nine; nor shall he dispense with primary evidence of any document, except in the cases herein-before excepted.

Note.

1 *The reason of the rule in this Section* —See Introduction in Stephen's Introduction to the Evidence Act, he remarks —

"When a man has to inquire into facts of which

which was not relevant within the meaning of the Evidence Act. A Judge or Magistrate in India
perform duties which in England woul
He has to sift out the truth for himsel

2. Read ss 208, 209 and 540 of the Crim Proc. Code and ss 120 and 171 of the Civ. Proc. Code

3. In India the Judge is bound
parties do not object. *The Q*
But if a relevant fact is allowe
not objected, it will not most

4 The reason for the protection from liability in cross-examination is given in *R. v. Shakaram Mukundji*, 11 B. H. C Rep., p. 166.

Power of jury or assessors to put questions.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

CHAPTER XI—Of Improper Admission and Rejection of Evidence.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

No new trial for rejection or improper reception of evidence.

Note.

1 This rule is substantially [illegible] But there is a difference betweer [illegible] Indian Law. In England wher [illegible] mission and rejection of evidenc [illegible] the verdict of the jury. In India where the Judge is the sole judge of law and fact, it will be always open for the Appellate Court to say that the improper rejection [illegible]

[illegible] *it is the duty of their Lordships, who are judges of fact, in such a case as this, to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decree."*

[illegible] jected, it must set aside the conviction

The rule in this section is applicable to criminal as well as civil cases. *R. v. Harisbole Chandar Ghose*, I. L. R., 1 Cal., 207.

2. Where evidence had been improperly admitted in the court of first instance, and the remaining evidence is insufficient to support the judgment, the party in whose favour the court of first instance, pronounced judgment is not entitled to [illegible]

3. Where a relevant fact is improperly allowed to be proved and the opposite party does not then and there object, he will not be allowed to do so in appeal; therefore although the procedure of the court of first instance is erroneous, the party will not get a new trial on that account. *Lalji Singh v. Sayed Akram Ser and others*, 3 B L. R., 235, & *Mark Ruddel Currie v. S. V. Muthu Raman Chetty*, 3 B L. R, 130.

4. Evidence cannot be said to be improperly admitted merely because it has been admitted at an improper stage of the proceedings, unless indeed the party has been prejudiced thereby. *Goshain Tota Ram v. Raja Bickmani Ballab*, 13

M I A., 83 But the admission of additional evidence in appeal without recording reasons for admission in accordance with s. 568 of the Code of Civil Procedure is *improper admission* of evidence. *Maharaja Jagadindra Banwari Gobind Bahadur* v. *Bhabatarini Dasi*, 5 B. L R, Ap. 51.

5. Where there is improper rejection of evidence affecting the decision, the proper course is not to order a new trial but to proceed in accordance with the provisions of s 568 of the Code of Civil Procedure, quoted below.—

"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if

(*a*) the Court against whose decree the appeal is made refuses to admit evidence which ought to have been admitted, or

(*b*) the Appellate Court requires any document to be produced for any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence to be produced, or document to be received, or witness to be examined.

Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission."

6 The fact that witnesses have been discredited by the lower court is no ground for appeal unless it is manifestly clear from the probabilities attached to certain circumstances in the case that the lower court was wrong. *Musadee Mohamed Casum Sherazee* v. *Mirza Ally Mohamed Shostry*, 6. M. I. A, 27.

7. Read also Sections 423 and 537 of the Code of Criminal Procedure.



SCHEDULE.

Number and year	Title.	Extent of repeal.
Stat 26 Geo III, c 57	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled, An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies), as requires the servants of the East India Company to deliver inventories to their estates and effects, for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof in certain cases, of deeds and writings executed in Great Britain or India.	Section thirty-eight so far as it relates to Courts of Justice in the East Indies.
Stat 14 & 15 Vic c 99.	To amend the Law of Evidence	Section eleven and so much of section nineteen as relates to British India.
Act. XV of 1852	To amend the Law of Evidence	So much as has not been heretofore repealed, saving section 12.
Act. XIX. of 1853.	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.
Act II. of 1855.	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act. XXV. of 1861.	For simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I of 1868	The General Clauses Act, 1868	Sections seven and eight.

THE

INDIAN EVIDENCE BILL.

Speech of the Hon'ble MR STEPHEN *on presenting the report of the Select Committee on the Bill to define and amend the Law of Evidence.*

(31st March 1871.)

"I FEEL that I owe an apology to your Lordship and the Council for requesting their attention to a second speech upon a purely legal subject after the one which I delivered a week ago upon the Limitation Act. On this occasion, however, I have to explain the position of a measure perhaps as important as any that has been passed of late years by the Indian legislature, inasmuch as if it becomes law, it will affect the daily administration of both civil and criminal procedure throughout the whole country. Moreover, the subject-matter to which the Bill refers is one of deep and wide general interest, for a Law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of inquiring into the truth as to controverted questions of fact, however imperfectly it may have been attained.

"This is the object which has been kept in view in framing the Bill which the Committee append to their report, and which I am now to describe in a general way to your Lordship and the Council

"I will state, in the first place, the history of the measure down to the present time. So far back as the year 1868, the Indian Law Commissioners drew a Draft Evidence Act, which was sent out to this country, and introduced and referred to a Select Committee by my friend and predecessor Mr. Maine. The Bill was circulated for opinion to the Local Governments, and was pronounced by every legal authority to which it was submitted to be unsuitable to the wants of this country. In this view the Committee concur for reasons which I need not state in detail on the present occasion, as they are fully stated in the report which I present to-day. I may observe in general, however, that the principal reasons were that the Bill was not sufficiently elementary; that it was in several respects incomplete, and that, if it became law, it would not supersede the necessity under which judicial officers in this country are at present placed of acquainting themselves by means of English hand books with the English law upon this subject. The Commissioners' draft, indeed, would hardly be intelligible to a person who did not enter upon the study of it with a considerable knowledge of the English law. Under these circumstances a new draft was framed, which we now propose to print and circulate, and on which I hope to receive the opinions of the Local Governments and High Courts in the

course of the summer, say, by next September, so that their criticisms may be deliberately weighed, and the measure may be finally disposed of by this time next year.

"The report of the Committee explains very fully the scheme of the Bill, which, of course, is of considerable, though not, I hope, unwieldy, length, and enters fully into the reasons which have led us to adopt its leading provisions I will not weary the Council by going into all these questions on the present occasion. I will confine myself to saying that I trust that those who will have to criticise the Bill will begin by studying the report, which has been drawn up with great care, and which, as well as the Bill itself, forms a connected and systematic whole The general object kept in view in framing the Bill has been to produce something from which a student might derive a clear, comprehensive and distinct knowledge of the subject, without unnecessary labour, but not, of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the Committee in general, and I in particular as the member in charge of the Bill, desire that it may be tried.

"With this reference to the Bill and the Report of the Committee, I proceed to discuss the general questions connected with the subject, and to mention a few of the leading features of the measure.

"I suppose that I may assume as generally admitted the necessity which exists for legislation on the subject of evidence in British India. It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is To some extent—it is far from being clear to what extent—and in some parts of the country—though questions might be raised as to the particular parts of the country—the English Law of Evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice, for if the English Law of Evidence has not been introduced into this country, English lawyers and quasi lawyers have, and they have been directed to decide according to the law of justice, equity, and good conscience Practically speaking, these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text-books. It is difficult to imagine anything much less satisfactory than such a state of the law as this A good deal may be said for an elaborate legal system, well understood and strictly administered A good deal may be said for unaided mother-wit and natural shrewdness; but a half and half system, in which a vast body of half-understood law, totally destitute of arrangement and of uncertain authority, maintains a dead alive existence, is a state of things which it is by no means easy to praise

[illegible] legislation to propose? A [illegible] egis- [illegible] the [illegible] one. It would consist of one rule, to this effect—All rules of evidence are hereby abolished." I believe that the opinion thus vigorously expressed is really held by a large number of persons who would not avow it so plainly. There is, in short, in the lay world, including in the expression the majority of Indian civilians, an impression that rules of evidence are technicalities invented by lawyers principally for what Bentham called fee-gathering purposes, and of no real value in the investigation of truth. I cannot admit that this impression is in any degree correct. I believe that rules of evidence are of very great value in all inquiries into matters of fact,

and in particular in inquiries for judicial purposes, and that it is practically impossible to investigate difficult subjects without regard to them

"It is worth while to illustrate this point a little, because the necessity for rules of evidence rests upon it; but strong proof of it is to be found in the fact that in all ages and countries there have been rules of evidence In rude times and amongst primitive people, the task of arriving at the truth as to matters of fact was regarded as so hopeless and difficult, that rude arbitrary substitutes for any sort of rational procedure were provided in the shape of ordeals and judicial combats. Where people began to obtain glimpses of the true methods of investigation, they seem to have considered as almost supernatural skill what in our days would fall within the scope of average police officers or attorney's clerks. The delighted wonder which was displayed by the jews, according to the apocryphal story of Susannah and the Elders, at what a legal friend of mine used to call 'that very feeble cross-examination of Daniel's about the trees,' is a good instance of this. At a later period, arbitrary rules of evidence began to be formed Such a fact must be proved by two eye-witnesses, such another by four, such another by seven To say nothing of European systems, in which such rules were in force, the Hedáya is full of them. These rules were never introduced in their full force into England, but the system which was adopted, or rather which grew up by degrees, was of a very mixed and exceedingly singular character Part of it consisted of rules declaring large classes of witnesses to be incompetent Part was intimately connected with the English system of special pleading, which was so contrived as to define with extreme precision the facts upon which the parties differed, or were, as the phrase goes, at issue. Part were the result of the practical experience of the Courts, and these were by far the most valuable portion, in my opinion, of the English Law of Evidence Most of the other rules have indeed been cut away by legislation, and the rules which still remain may fairly be taken to be the nett result of English judicial experience in modern times. In the most general terms, these rules are—

1. that evidence must be confined to the issue;
2. that hearsay is no evidence,
3. that the best evidence must be given;
4. rules as to confessions and admissions;
5 rules as to documentary evidence.

"*I have two general remarks to make upon them*

The first is that they are sound in substance and eminently useful in practice, and that when properly understood, they are calculated to afford invaluable assistance to all who have to take part in the administration of justice.

"The second is that I believe that no body of rules upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length.

"It is necessary to prove the first of these propositions, in order to justify the recommendation of the Committee that the substance of the rules in question should be introduced in the form of express law into this country. It is necessary to prove the second proposition, in order to justify the attempt made in the Bill to reduce the rules to order and system

"First, then, as to the proposition that the rules in question are substantially sound, and do far more good than harm, even in their present confused condition. The proof of this is, I think, to be found in a comparison between the proceedings of English Courts of Justice and those of countries which have no such rules, and

between the proceedings of English Courts in which these rules are, and those in which they are not, understood and acted upon. As a preliminary remark, I think I ought to observe that the knowledge of these rules possessed by English lawyers is derived far more from the daily practice in the Courts than from theoretical study Many English lawyers know by habit, almost instinctively, whether this or that (to use the common phrase) is or is not evidence, although they have hardly given the theory of the matter a thought Practice, therefore, and not theory, affords the true test of the value of these rules. In fact, the clumsy, intricate, ambiguous, and in many instances absurd, theory by which the rules of evidence are connected together came after the eminently sagacious practice which they were intended to justify and explain. What is the practical effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the criminal laws of England, and which contains, amongst other things, an analysis of several celebrated trials, English and French. One object of that analysis was to contrast the effect of the presence and absence of rules of evidence, and I think that any one who would take the trouble to compare those trials together carefully would agree with me in the conclusion that the practical effect of the English rules of evidence in those cases was to shorten the proceedings enormously, and at the same time to consolidate and strengthen them, keeping out nothing that a reasonable person would have wished to have before him as materials for his judgment The French system, on the other hand, which dispenses with all rules of evidence, got, at least in those cases, no other result from the want of them than floods of irrelevant gossip and collateral questions enough to confuse and bewilder the strongest head Again, compare the proceedings of an ordinary Court of criminal justice with the proceedings of a court-martial, in which the rules of evidence are far less strictly enforced and less clearly understood An ordinary criminal Court never gets very far from the point, but a court-martial continually wanders into questions far remote from those which it was assembled to try. Nothing, for instance, is more common than to see the prosecutor change places, as it were, with the prisoner, or to find collateral issues pursued till the Court finds itself engaged in determining, not whether A was guilty of a military offence, but whether Z told a falsehood on some perfectly irrelevant subject. In a case which I well recollect, B testified against A B being cross-examined to his credit stated a fact not otherwise relevant to the enquiry. Z denied the fact which B affirmed, and made farther statements which were contradicted by intermediate letters of the alphabet. No judge can possibly be expected, by the mere light of nature, to know how to set limits to the enquiries in which he is engaged; yet if he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow. Active and zealous advocates, who, have no rules of evidence to restrain their zeal, would have it in their power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely: that might, and often would, in such hands, be made the excuse for tearing open old quarrels and reviving questions laid at rest, and giving fresh animus to scandals long since exploded; and the main question would frequently be lost sight of in a cloud of irritating and useless collateral issues. I may be excused for referring to my own experience at the Bar in illustration of this. Appeals against orders of affiliation used invariably to produce an amount of perjury and counter perjury which I should think it would be difficult to exceed in any country. In certain parts of the country, it was a point of honour for the friends of the putative father and of the mother, respectively, to 'go to

session to swear for him, or her,' as they used to say. No one who did not take part in such cases could imagine the strange ramifications of falsehood and contradiction into which a hotly-contested case of this kind would spread, or the number of imputations thrown on the honesty and chastity of the different witnesses, male and female If it had not been for the rules of evidence of the reputations of half the population of the village would have been torn in pieces. The rules of evidence kept matters to a point, and so minimized the evil, but the parties, to the witnesses, and the attorneys, all appeared to me to be, one more anxious than another, to fight the matter out till the very last rag of character had been stripped off the back of every man, woman, and child, whose name was in any way brought into the discussion The French Courts display this evil in an aggravated form. In the Work to which I have already referred will be found an account of the trial of a monk named Leotade for murder If disposed of under the English rules of evidence, it could hardly have taken more than a day or two at the most. In the French Court, it lasted for, I think, about three weeks, and branched out into all sorts of subjects One witness, in particular, was discovered to have seduced a girl seven years before, and letters from her to him were read to throw light on his character. He naturally wished to give his own account of the transactions, but was stopped on the ground that a line must be drawn somewhere, and that the Court chose to draw it between the point at which an irrelevant slur had been thrown on his character and the point at which, had been permitted to do so, he might have given an equally irrelevant explanation.

"It is not, however, merely for the purpose of confining judicial proceedings within reasonable limits that rules of evidence are useful They are also of preeminent importance for the purpose of protecting and guiding the judge in the discharge of his duty. There is a sense in which it may be said with perfect truth that even legislative power is unequal to the task of abolishing rules of evidence No doubt, it is competent to the legislature to provide that no rules of evidence shall have the force of law; but unless they expressly forbid all Courts and Judges to act upon any rules at all, or to listen to any arguments as to the manner in which they shall exercise the discretion with which they are invested (propositions too absurd to state or to discuss), the Judges infallibly will hear, and will be guided by, arguments upon the subject, and these arguments will be drawn from the practice of English Courts. Moreover, the Courts of Appeal will exercise their own discretion in the matter, and thus, by degrees, the system would grow up again in the most cumbrous, chaotic and inconvenient of all conceivable shapes The plain truth is, that there is only one possible way of getting rid of the law of evidence, and that is by getting rid of the administration of justice by lawyers and returning to the system of mere personal discretion.

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss

"So far, I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point, and of protecting and supporting the Judges I must now say a few words on their value as furnishing the Judge with solid tests of truth. I fully admit that their value in this respect is often exaggerated and misconceived; but I think that, when the matter is fairly stated, it will be found that they have a real, though it may be described as a negative, value for this purpose. There are two great problems on which the rules of evidence throw no light at all, and on which they are not intended to throw any light, and it must be admitted that those problems are by far the most important

of any which a Judge has to solve. No rule of evidence that ever was framed will assist a Judge in the very smallest degree in determining the master question of the whole subject—whether, and how far, he ought to believe what the witnesses say? Again, rules of evidence are not, and do not, profess to be rules of logic. They throw no light at all on a further question of equal importance to the one just stated What inference ought the Judge to draw from the facts in which, after considering the statements made to him, he believes? In every judicial proceeding whatever, these two questions—Is this true, and, if it is true, what then?—ought to be constantly present to the mind of the Judge, and it must be admitted, both that the rules of evidence do not throw the smallest portion of light upon them and that persons who are absolutely ignorant of those rules may give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. I think that a more or less distinct perception of this, coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike with which they are at times regarded. This dislike, I think merely a particular application of the vulgar error which in so many instances leads people to deprecate art in comparison with nature, as if there were an opposition between the two, and as if art in all cases did not presuppose and depend upon nature. The best shoes in the world will not make a man walk, nor will the best glasses make him see; and in just the same way, the best rules of evidence will not supply the place of natural sagacity or of a taste for and training in logic, but it no more follows that rules of evidence are useless as guides to truth, than that shoes or glasses are useless as assistances to the feet and to the eyes. The real use of rules of evidence in ascertaining the truth consist in the fact that they supply negative tests, warranted by very long and varied experience, as to two great points, the relevancy of facts to the question to be decided by the Court and the sort of evidence by which particular facts ought to be proved. They may in the broadest and most popular form be stated thus:—

"If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims:—

"First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from other facts, let those facts, at all events, be closely connected with the principal fact in some one of certain specific modes Secondly, never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had; that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes: if it was a thing said, have before you some one who heard it said with his own ears · if it was a written paper, have the paper before you and read it for yourself. This exception—qualifications and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny, either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning and to apply them to the practical questions which arise in the administration of justice, with no assistance from any express law. I do not wish to exaggerate, but I must add, that I attach considerable moral and speculative value to these rules. If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come

before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief upon a great variety of matters which will be of vast importance I ought to add that the good which they are calculated to effect can be obtained only by erecting them into laws and rigorously enforcing them. When this is done, I feel confident that experience will be continually adding to the proof of their value

"So far, I have tried to prove the proposition that the English rules of evidence are of real solid value, and that they are not a mere collection of arbitrary subtleties which shackle, instead of guiding, natural sagacity. I pass now to the next proposition, which is, that these rules are expressed in a form so confused, intricate and lengthy, that it is hardly possible for any one to learn their true meaning otherwise than by practice, an inconvenience which may be altogether avoided by a careful and systematic distribution For the proof of this proposition, if indeed it is disputed, I can only refer in general to the English text-books on the subject They form a mass of confusion which no one can understand until, by the aid of long practice, he learns the intention of the different rules, of which they heap together innumerable and often incoherent illustrations. I am far from wishing to impute this as a fault to the industrious, and in many cases distinguished, authors of these compilations. They, like all other hand-books, are intended for immediate practical purposes, and are mere collections of enormous masses of isolated rulings, generally relating to some very minute point. It was necessary, therefore, that they should be arranged, rather with reference to vague catch-words with which the ears of lawyers are familiar, than with reference to theoretical principles which it has never been worth any lawyer's while to investigate.

"The condition of the law of evidence, as well as the condition of many other branches of the law of England, affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an absence of sound theory, or, what is still worse, with the presence of unsound theory. No one who has not seen it could possibly imagine how obscure the meaning of a clever man may become when he is forced to squeeze it into the terms of a theory which does not fit it and is not true. I will give one or two illustrations of my meaning The expression 'hearsay is no evidence' early obtained considerable currency in the English Courts. In a general way, its meaning is clear enough, and, what is more, is true, but, when considered as the scientific expression of a general truth, from which rules can be deduced in particular cases, it is inaccurate, faulty and obscure to the last degree. The objections to it are, that both 'Hearsay' and 'Evidence' are words of the most uncertain kind, each of which may mean several different things. For instance, hearsay may mean what you have heard a man say, and this is its most obvious meaning; but it is difficult to imagine a grosser absurdity than the assertion that no one is ever to prove, in a judicial proceeding, anything said by any other person. 'Hearsay,' again, may be taken to mean that which a person did not perceive with his own organs of perception; but this is not the natural sense of the word, and it is almost impossible in practice to divest a word of its natural meaning

"The word 'evidence' is also exceedingly ambiguous It may mean that which a witness says in Court. It may mean the facts to which he testifies, regarded as a groundwork for further inference. Notwithstanding this, the phrase 'hearsay is no evidence,' being emphatic and easy to recollect, stuck in the ears and in the minds of lawyers, an

has been taken by many text-writers as the principle on which their statement of the most important branch of the law should be arranged They accordingly took to describing as hearsay every fact of which evidence was by law excluded; in short, they turned 'hearsay is no evidence' into 'that which is not evidence is hearsay.' They did not, however, do this expressly; they did it by describing as exceptions to the rule excluding hearsay all cases in which evidence was admitted of anything which would have been excluded but for such exceptions. This is so intricate a statement that I can hardly expect the Council to follow me, but I will give an illustration of what I mean The question is, whether a piece of land belongs to A or B, A says that it belongs to him, because his father C bought it from D, who bought it from E, and he produces the deeds by which he conveyed the land to D and D conveyed it to C Now, as D and E are not parties to the suit between A and B, and as A cannot of his own knowledge know anything of the transaction between them, English text-writers call the deed between D and E 'hearsay;' and, according to Mr. Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay. One of the Judges, if I am not mistaken, called such evidence 'written hearsay,' and so indifferent are English lawyers in general to the abuse of language for the sake of momentary convenience that it probably never struck him that this was a contradiction in terms I think, however, that it is hard to expect people to understand, bear in mind, and follow out in all its ramifications a system which employs language in such a peculiar manner as to call ancient deeds 'written hearsay.' To talk of hearing a document is like talking of seeing a sound.

"I now turn to the ambiguity of the word 'evidence,' to which I have already referred As I have just said, 'evidence' sometimes means a fact which suggests an inference For instance, it is common to say,—'Recent possession of stolen goods is evidence of theft,' that is, the fact of such possession suggests the inference of theft At other times, and I think more frequently, 'evidence' means what a witness actually says in Court, or that which he produces. For instance, we say the evidence which he gave was true I might occupy, I will not say the attention, but the time, of your Lordship and the Council for hours if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject. I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence,' is introduced 'Circumstantial evidence,' 'hearsay evidence,' 'direct evidence,' 'primary evidence,' 'best evidence,' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject, or see how its various parts are related to each other, without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence which few people are in a position to bestow upon the subject.

"I may appear to be detaining the Council unduly upon merely verbal questions, but I think that it is a common fault to under-rate the importance of accurate language, particularly in regard to the fundamental terms of any particular branch of knowledge. In regard to law, I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it is due to the *fact that proper* pains have never been bestowed on the definition of its fundamental terms. What could be made of Euclid if we were not quite sure of our meaning when we spoke of a point, a line, a circle, parallels, and perpendiculars? such a defect would render

Geometry impossible, and the defect which makes large parts of the law almost unintelligible, and beyond all measure cumbrous and unwieldy, is precisely analogous to it in principle I believe that, if its fundamental terms were defined as clearly as the term 'law' was defined by the late Mr. Austin, the study of law would become comparatively easy, and in many cases attractive for its own sake; that its bulk might be diminished to a degree of which people in general have hardly any conception, that the expense of its administration might be greatly diminished, and that comparative certainty might do away with a very large amount of needless and harassing litigation

"I shall now proceed to describe, shortly, the principles on which the Draft Bill of the Committee has been framed In the first place, we thought it necessary to fix the sense in which the fundamental terms of the subject should be understood, and for that purpose we define 'fact,' 'evidence,' 'proof,' 'proved,' and some others as to which I will content myself with a reference to the report It seemed to us that the remainder of the subject would fall under the following general heads —

1 —The relevancy of fact to the issues to be proved.

2 —The proof of facts, according to their virtue, by oral, documentary, or material evidence

3.—The production of evidence in Court

4 —The duties of the Court, and the effect of mistaken admission or rejection of evidence.

"These heads would, we think, be found to embrace, and to arrange in their natural order, all the subjects treated of by English text-writers and Judges under the general head of the Law of Evidence. I will say a few words on their relation to each other, and of each of them in turn.

"The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts. The neglect of this distinction by English text-writers, no doubt, arises from the ambiguity of the word 'evidence', to which I have already referred, and is the main cause of the extreme difficulty of understanding the English law of evidence systematically. I will shortly illustrate my meaning. A says, 'Z committed murder.' First of all, this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards Now, whether this fact is or is not relevant in a particular case depends upon a variety of circumstances If the question is, whether A was guilty of defaming Z by accusing him of murder; or whether Z had a motive for assaulting A, because A said that he had committed murder; or if Z is accused of murder, and the object is to show that, when A charged him with it, he behaved as if he were guilty, and in many other instances which might be put, the fact that A spoke those words is clearly relevant. But if the question is, whether Z actually did commit murder, the fact that A thought so or said so, generally speaking, is not relevant. Supposing, however, that the fact is relevant on some one of the grounds just mentioned, or on any other ground, whatever be the ground on which the words are relevant to the matter under inquiry, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English Law—and we think it is a wise rule—is that they must be proved by the assertion of some witness that he heard them said with his own ears English text-writers throw together these two classes of rules under the head of Hearsay. They lay down the general rule that hearsay is no evidence, meaning by it that certain classes of facts alled hearsay are to be treated as irrelevant to the determination of particular

questions, and it is necessary to look through a long list of exceptions to that rule in order to see whether, in a particular case, A's statement may or may not be proved. If you find that it can be proved, the question is, how can it be proved? and you propose to prove it by a witness who says that B told him that he heard A say so Again, you are told, 'hearsay is no evidence,' but this time the expression means, not that the fact is irrelevant, but that the testimony by which it is proposed to prove the fact is improper. One extreme inconvenience of this is that the most important part of the English law of evidence is thrown into the most intricate and inconvenient of all possible forms, that of a very wide negative, of most uncertain meaning, qualified by a long string of exceedingly intricate exceptions.

"No one who has not gone through the process of learning the law by mere rule-of-thumb practice can imagine the degree of needless obscurity and difficulty upon this point, of the existence of which he becomes gradually conscious. It would be perfectly fair to say to almost any English text-writer, 'you tell me, at enormous length, what is not evidence, but you nowhere tell me what is evidence, except, indeed, in large compilations, which point out what has to be proved upon particular issues, and which it is as impossible to read or remember, as it is to read or remember *any other mere works of reference*'

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant, as being sufficiently connected with the facts in issue to afford grounds for an inference as to their existence or non-existence I will not weary the Council by mentioning those rules, and I will content myself by referring to the Bill and to the report But I may shortly illustrate them by reference to a passage from a modern historian, which will relieve the dulness of a very technical speech. The passage to which I refer is a short summary, by Mr. Froude, of the grounds on which he believes that Mary, Queen of Scots, murdered her husband

"As Mr Froude is not a lawyer, he certainly wrote what I am about to read without reference to rules of evidence I think the fact that he did, in fact, unconsciously observe them illustrates very strongly the truth of my assertion that they are no more than the result of experience and practical sagacity thrown into a categorical shape. I need hardly say that I use the passage merely as an illustration, and without any notion of adopting Mr Froude's opinions, or asserting the truth of his facts. I am concerned merely with their relevance.

"'She (Mary) was known *to have been weary of her husband, and anxious to get* rid of him'

"(By our draft, facts which show motive are relevant.)

"'The difficulty and the means of disposing of him had been discussed in her presence, and she had herself suggested to Sir James Balfour to kill him.'

"(Facts which show preparation for a fact in issue are relevant)

"'She brought him to the house where he was destroyed; she was with him two hours before his death;'

"(Facts so connected with the facts in issue as to form part of the same transaction are relevant)

"'and afterwards threw every difficulty in the way of any examination into the circumstances of his end.'

"(Subsequent conduct influenced by any fact in issue is relevant)

"'The Earl of Bothwell was publicly accused of the murder.'

"(Facts necessary to be known in order to introduce relevant facts are relevant.)

"'She kept him close at her side; she would not allow him to be arrested; she went openly to Seton with him before her widowhood was a fortnight old. When at last, unwillingly, she consented to his trial, Edinburgh was occupied by his retainers. He presented himself at the Tolbooth surrounded by the Royal Guard, and the charge fell to the ground, because the Crown did not prosecute and the Earl of Lennox had been prevented from appearing.'

"(Subsequent conduct influenced by any fact in issue is relevant.)

"'A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him.'

"(Subsequent conduct. Motive.)

"A large part of the evidence consisted of certain letters which the Queen was said to have written. Mr. Froude, in passages which I need not read, alleges facts which go to show that she tried to prevent the production, and to secure the destruction, of these letters. An illustration as to subsequent conduct meets the case of a person who destroys or conceals evidence.

"Finally, Mr. Froude observes: 'In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words.'

"The letters would be evidence under the section relating to admissions, and Mr. Froude's remark is in nature of a criticism on them by a prosecuting Counsel.

"In English text-books, so far as my experience goes, these rules and others of the same sort are nowhere presented in a compact substantive form. They come in, for the most part, as exceptions to the rule that evidence must be confined to the points in issue. In fact, they can be learned only by the practice of the Courts, though they are as natural and lax as any rules need be if they are properly stated.

"From the rules which state what facts may be proved, we pass to those which prescribe the manner in which a relevant fact must be proved. Passing over technical matters—such as the law relating to judicial notice, questions relating to public documents, and the like—these rules may be said to be three in number, though, of course, numerous introductory rules are required to adopt for practice. They are these—

"1. If a fact is proved by oral evidence, it must be direct; that is to say, things seen must be deposed to by some one who says he saw them with his own eyes. Things heard by some one who says he heard them with his own ears.

"2. Original documents must be produced or accounted for before any other evidence can be given of their contents.

"3. When a contract has been reduced to writing, it must not be varied by oral evidence.

"These rules, as I have said, are subject to certain exceptions, and require certain practical adjustments; but I do not think that any one who has had practical experience of the working of courts of justice will deny their substantial soundness, or indeed the absolute practical necessity for enforcing them.

"Passing over certain matters which are explained at length in the Bill and report, I come to two matters to which the Committee attach the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refers to the part taken by the Judge in the examination of witnesses, the second to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal.

"That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries which may incidentally tend to something relevant, and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him, but to inquire to the utmost into the truth of the matter. We do not think that the English theories, that the public have no interest in arriving at the truth, and hat even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England

"With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone through the various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise; and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be, and give judgment accordingly.

"I have addressed your Lordship and the Council at great length, but not, I think, at greater length than the importance of the matter requires. I have only to add that I propose to proceed with the Bill when the Government returns to Calcutta, and I hope before that time to receive the criticisms of the Local Governments upon the measure."

LIABILITY TO DAMAGES FOR REFUSING TO GIVE EVIDENCE

ACT 19 OF 1853, SECTION 26

26 Any person, whether a party to the suit or not, to whom a summons to attend and give evidence or produce a document, shall be personally delivered, and who shall, without lawful excuse, neglect or refuse to obey such summons, or who

shall be proved to have absconded ...
with such
quired by
without l
produce a
under this Act, be liable to the party at whose request the summons shall have ... be required to give evidence, or produce ... may sustain in consequence of such neg- ... keeping out of the way as aforesaid, to

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19 & 20, Vic. Cap 113.

An Act to provide for taking evidence in Her Majesty's dominions in relation to Civil and Commercial matters pending before foreign tribunals.

(29th July 1856.)

Whereas it is expedient that facilities be afforded for taking evidence in Her Majesty's dominions in relation to Civil and Commercial matters pending before foreign tribunals: Be it enacted.

1. Where, upon an application for this purpose, it is made to appear to any

es accordingly; and it shall be lawful for the said Court or Judge, by the same order, or for such Court or Judge, or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such Court or Judge in a cause depending in such Court or before such Judge.

2. A certificate und...

Certificate of ambassador, &c., sufficient evidence in support of application.

... nt or Consul having jurisdiction ... tribunal is desirous of obtaining ... om the application relates, shall ... o no such certificate is produced

3. It shall be lawful for every person authorized to take the examination of witnesses by any order made in pursuance of this Act to take all such examinations upon the oath of the witnesses, or affirmation in case where affirmation is allowed by law instead of

Examination of witnesses to be taken upon oath.

or elsewhere in Her Majesty's dominions, beyond the jurisdiction of the Court ordering the examination, it shall be lawful for such Court, or the Chief Judge thereof, or such Judge, to nominate some fit person to take such examination, and any deposition or examination taken before an examiner so nominated shall be admissible in evidence to the same extent as if it had been taken by or before such Court or Judge

3 Where in any cr

Power in criminal proceedings to nominate Judge or Magistrate to

same extent as if it had been taken by or before the Court or Judge to whom the mandamus or order was addressed.

4 The provisions of the Act passed in the twenty-second year of Her Majesty, chapter twenty, intituled "An Act to provide for taking evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals" (which may be cited as the Evidence by Commission Act, 1859), as amended by this Act, shall apply to proceedings under this Act.

Application of 22 Vic, c 20, as to conduct money, &c, to proceedings under this Act.

5. The power to make rules conferred by section six of the Evidence by Commission Act, 1859, shall be deemed to include a power to make rules with regard to all costs of or incidental to the examination of any witness or person, including the remuneration of the examiner, if any, whether the examination be ordered pursuant to that Act or under this or any other Act for the time being in force relating to the examination of witnesses beyond the jurisdiction of the Court ordering the examination

Amendment of 22 Vic. c 20, as to costs.

6. When pursuant to any such commission, mandamus, order, or request as in this Act referred to any witness or person is to be examined in any place beyond the jurisdiction of the Court order-

Oath or affirmation of witness

ed on oath before a person duly authorized to administer an oath in the Court, ordering the examination.

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22 & 23, Vic. Cap. 63.

An Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof.

(13th August 1859)

Whereas great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof: Be it therefore enacted, &c.

Preamble.

1. *If*, in any action depending in any Court within Her Majesty's dominions, it

Courts in one part of Her Majesty's dominions may remit a case for the opinion in law of a Court in any other part thereof.

Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act, and it shall be

parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the Court, and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper.

Opinion to be authenticated and certified copy given.

2 Upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion.

4. In the event of an appeal to Her Majesty in Council or to the House of

Her Majesty in Council or House of Lords on appeal may adopt or reject opinion.

House may respectively adopt or reject such opinion of any Court whose judgments are respectively reviewable by them as the same shall appear to them to be well founded or not in law.

5. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, Civil, Criminal or Ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the

Interpretation of terms.

...Chancellor, ... Divorce ... Scotland, ... of its ... Rolls ... minions,

An Act to afford facilities for the better ascertainment of the law of foreign countries when pleaded in Courts within Her Majesty's dominions

(17th May 1861)

Preamble 22 & 23 Vic c 63.

Whereas an Act was passed in the twenty-second and twenty-third years of Her Majesty's reign, intituled an Act to afford facilities for the more certain ascertainment of the law administered in one

dominions and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State: Be it therefore enacted, &c

1

Superi Her M mions n with qu of any within Majesty may have made a convention for that purpose, for ascertainment of law of such State.

such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of a jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may

convention, whose opinion is desired upon the law administered by such foreign

and requesting them to

; and upon such opinion

of such Court, shall be

Court in which action depends to apply such opinion to the facts set forth in cases, &c.

2 It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with the officer of the Court within Her Majesty's dominions in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in

alterations or amendments, to the same or to any other such Superior Court in such foreign State as aforesaid and so from time to time as may be necessary or expedient.

3 If, in any action depending in any Court of a foreign country or State with whose Government Her Majesty shall have entered into a

Courts in Her Majesty's dominions may pronounce opinion on case remitted by a foreign Court.

is desired a case setting forth the facts and the questions of law arising out of the same on which they desire to have the opinion of a Court within Her Majesty's dominions, it shall be competent to any of the parties to the action to present a petition to such last mentioned Court, whose opinion is to be obtained, praying such Court to hear parties or their counsel, and to pronounce their opinion thereon in

parties to the action by whom the same shall be required

4 In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, Civil, Criminal or Ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice-Chancellor,

Interpretation of terms.

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31 & 32 VIC CAP. 37.

An Act to amend the law relating to documentary evidence in certain cases.

(25th June 1868)

Preamble.

WHEREAS it is expedient to amend the law relating to evidence: Be it enacted, &c

Short title.

1. This Act may be cited for all purposes as "The Documentary Evidence Act, 1868."

Mode of proving certain documents.

2. *Primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under ... officer as is mentioned ... n all Courts of Justice, ... the modes hereinafter

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

(2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or, where the question arises in a Court in any *British* Colony or possession, of a copy purporting to be printed under the authority of the legislature of such *British* Colony or possession

(3) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer

Any copy or extract made in pursuance of this Act may be in print or in writing or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

Act to be in force in Colonies.

3 Subject to any law that may be from time to time made by the legislature of any *British* Colony or possession, this Act shall be in force in every such Colony and possession.

Punishment of forgery

4 If any person commits any of the offences following, that is to say—

(1.) Prints any copy of any proclamation, order, or regulation which falsely [illegible] r to be printed [illegible] or possession [illegible], or regulation [illegible] knowing that the same was not so printed; or

(2) Forges or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorized to be annexed to a copy of, or extract from, any proclamation, order, or regulation;

he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude for such term as is prescribed by the Penal Servitude Act, 1864, as the least term to which an offender can be sentenced to penal servitude, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Definition of terms.

5. The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such constructions; (that is to say)—

[illegible] shall for the purposes of this Act, include the [illegible] nd such territories as may [illegible] Majesty by virtue of any [illegible] other Her Majesty's dominions.

"Legislature."

"Legislature" shall signify any authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for any Colony or possession.

"Privy Council."

"Privy Council" shall include Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council, that is not specially named in the schedule hereto.

"Government Printer."

"Government Printer" shall mean and include the printer to Her Majesty and any printer purporting to be the printer authorized to print the Statutes, Ordinances, Acts of State, or other public Acts of the legislature of any *British* Colony or possession, or otherwise to be the Government printer of such Colony or possession.

"Gazette."

"Gazette" shall include the *London Gazette*, the *Edinburgh Gazette*, and the *Dublin Gazette*, or any of such Gazettes

Act to be cumulative.

6 The provision[illegible] this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing Statute or existing at Common Law.

SCHEDULE.

COLUMN 1	COLUMN 2.
Name of Department or Officer.	Names of Certifying Officers
The Commissioners of the Treasury .	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State	Any Secretary or Under-Secretary of State
Committee of Privy Council for Trade ..	Any member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The Poor-Law Board	Any Commissioner of the Poor-Law Board or any Secretary or Assistant Secretary of the said Board

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ACT No. XVIII OF 1872.

(RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 29TH AUGUST 1872.)

AN ACT TO AMEND THE INDIAN EVIDENCE ACT, 1872.

Preamble.

WHEREAS it is expedient to amend the Indian Evidence Act, 1872; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Indian Evidence Act Amendment Act."

Amendment of Act I of 1872, section 32, clauses 5 and 6.

2 In section thirty-two of the Indian Evidence Act, 1872, clauses five and six, after the word "relationship," the words "by blood, marriage or adoption" shall be inserted.

Amendment of section 41.

3 In section forty-one of the same Act, lines seventeen, twenty and twenty-three, after the word "judgment," the words "order or decree" shall be inserted.

Amendment of section 45.

4. In section forty-five of the same Act, line five, after the word "art," the words "or in questions as to identity of handwriting" shall be inserted.

Amendment of section 57.

5. In section fifty-seven of the same Act, paragraph (13) after the word "road," the words "on land or at sea" shall be inserted.

Amendment of section 66.

6. In section sixty-six of the same Act, line five, after the word "is," the words "or to his attorney or pleader" shall be inserted

7 In section ninety-one of the same Act, Exception 2, for the words "under the Indian Succession Act," the words "admitted to probate in British India," shall be substituted.

Amendment of section 91.

8. [*Repealed by Act No XII of* 1876.]

9 In section one hundred and eight of the same Act, line one, for the word "When," the words "Provided that when" shall be substituted; and, in the last line, for the word "on," the words "shifted to" shall be substituted.

Amendment of section 108.

10 In section one hundred and twenty-six of the same Act, line twenty-two, and section one hundred and twenty-eight of the same Act, line six after the word "barrister," the word "pleader" shall be inserted.

Amendment of sections 126 and 128.

In section one hundred and twenty-six of the same Act, line fifteen, for the word "criminal," the word "illegal" shall be substituted.

11 In section one hundred and fifty five of the same Act, paragraph (2), for the word "had," the word "accepted" shall be substituted

Amendment of section 155.

12 [*Repealed by Act No X of* 1873]

ACT No. X OF 1873.

(RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 8TH APRIL 1873.)

THE INDIAN OATHS ACT, 1873.

An Act to consolidate the law relating to Judicial Oaths, and for other purposes.

WHEREAS it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations, and to repeal the law relating to official oaths, affirmations and declarations; It is hereby enacted as follows:—

Preamble.

I.—Preliminary.

1. This Act may be called "The Indian Oaths Act, 1873:"

Short title.

It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty;

Local extent.

And it shall come into force on the first day of May 1873.

Commencement.

2 [*Repealed by Act XII of* 1873.]

3. Nothing herein contained applies to proceedings before Courts Martial, or to oaths, affirmations or declarations prescribed by any law which, under the provisions of the Indian Councils' Act, 1861, the Governor-General in Council has not power to repeal.

Saving of certain oaths and affirmations.

II.—Authority to administer Oaths and Affirmations.

4 The following Courts and persons are authorized to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:—

Authority to administer oaths and affirmations.

(a) All Courts and persons having by law or consent of parties authority to receive evidence;

(b) The Com[redacted]fficer of any military station occupied by troops in the service of Her Majesty Provided

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

III.—Persons by whom Oaths or Affirmations must be made.

Oaths or affirmations to be made by— 5. Oaths or affirmations shall be made by the following persons —

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence

Witnesses.

Interpreters. (b) interpreters of questions put to, and evidence given by, witnesses, and

Jurors (c) jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties

Affirmation by Natives or by persons objecting to oaths. 6 Where the witness, interpreter or juror is a Hindu or Muhammadan,

or has an objection to making an oath,

he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

IV.—Forms of Oaths and affirmations.

Forms of oaths and affirmations. 7 All oaths and affirmations made under Section 5 shall be administered according to such forms as the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

8 If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form [illegible]

Pow[illegible] tends [illegible]

purp[illegible] any [illegible]

Court may ask party or witness whether he will make oath proposed by opposite party. 9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in Section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question

Administration of oath if accepted.

10. If such party or witness agrees to make such [illegible]ation, the Court may proceed to administer it, or if [illegible] of such a nature that it may be more conveniently made out of Court, the Court may issue a Commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Evidence conclusive as against person offering to be bound.

11 The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated

Procedure in case of refusal to make oath.

12 If the party or witness refuses to make the oath or solemn affirmation referred to in Section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

V—Miscellaneous.

Proceedings and evidence not invalidated by omission of oath or irregularity.

13 No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Persons giving evidence bound to state the truth.

14 Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

Amendment of Penal Code, Sections 178 & 181.

15. The Indian Penal Code, Sections 178 and 181, shall be construed as if after the word "oath," the words "or affirmation" were inserted

Official oaths abolished.

16. Subject to the provisions of Sections 3 and 5, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.